Supreme Court, U.S.
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No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

October 1999 Term

MISTICK PBT,

*Petitioner,*

vs.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, *et al.*,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the phrase "based upon" as used in 1986 Amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4), should be given its plain meaning of "derived from," in accordance with the decisions of certain United States Courts of Appeals, or instead should be interpreted to mean "supported by" or "substantially similar to," as decided by certain other United States Courts of Appeals?

2. Whether a U.S. Government response to a Freedom of Information Act ("FOIA") request constitutes an "administrative report" or an "administrative investigation" as those terms are used in § 3730(e)(4)(A), therefore barring *qui tam* actions "based upon" information obtained through the FOIA?

3. Whether a person is disqualified from being an "original source" under § 3730(e)(4)(B) when that person's *qui tam* suit is "based upon" fraudulent transactions that were publicly disclosed as a result of that person's efforts?

## LIST OF PARTIES

Mistick PBT ("Mistick"), the Petitioner, brought this case against Respondents as a private relator plaintiff under the False Claims Act, *see* 31 U.S.C. 3730(b)(1), in the United States District Court for the Western District of Pennsylvania (the "District Court"). Mistick was the general contractor for two housing projects owned by Respondent Housing Authority of the City of Pittsburgh ("HACP"). Respondents Miller and Washington were officers of HACP. Respondents L. D. Astorino & Associates, Ltd. (formerly known as L. D. Astorino Architects, Inc.), Astorino Branch Environmental, Inc., Astorino Branch Engineers, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch and Bernard J. Quinn (referred to herein together as "Astorino") were the architects for the two housing projects.

Mistick also was the appellant in the United States Court of Appeals for the Third Circuit. Respondents were defendants in the District Court and appellees in the Third Circuit.

## STATEMENT UNDER SUP. CT. R. 29.6

Mistick is a Pennsylvania business trust and is not a "corporation" under Pennsylvania state law. In any event, Mistick has no parent or subsidiary company ("subsidiary" being defined as ownership by Mistick of greater than 50%).

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## OPINIONS BELOW

The Third Circuit opinion in *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, No. 97-3248 (Appendix A at 1a), is reported at 186 F.3d 376 (3d Cir. 1999). The order of the Third Circuit denying Mistick's Petitions for Rehearing and Rehearing En Banc (Appendix E at 92a) is not reported. The opinion of the District Court (Appendix C at 66a) is not reported.

## BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on July 30, 1999. Mistick's Petitions for Rehearing and for Rehearing En Banc were denied on September 9, 1999, and this Petition for Writ of Certiorari was filed within 90 days thereafter. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994). The constitutionality of a statute is not at issue.

## STATUTORY PROVISIONS INVOLVED

This Petition involves 31 U.S.C. § 3730(e)(4), which states in full:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or United States [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney

> General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the United States before filing an action under this section which is based on the information.

## STATEMENT OF THE CASE

### A. Statutory Background

This case arises under the False Claims Act (the "Act"), 31 U.S.C.. §§ 3729 *et seq.* (1994), which makes unlawful the making of false statements to the United States Government ("United States" or "Government"), in order to obtain payment for a claim. A private person (known as the "relator") may bring a civil action for violation of the Act on behalf of itself and the United States (referred to as a "*qui tam*" action), and retain a portion of any damages recovered. *See id.* § 3730(b)(1), (d).[1]

Based on growing concerns regarding the frequency and amount of contractor fraud against the United States, Congress, through 1986 amendments to the False Claims

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[1] Under the Act, the Government is initially given the option of intervening in and conducting an action brought by the relator, but if the Government declines to intervene, then the relator has the right to conduct the action itself. *See* 31 U.S.C. § 3730(b)(4) (1994).

Act, substantially liberalized a jurisdictional bar applicable to *qui tam* litigants. The amended bar, which is at issue in this Petition, applies only when the relator's action is "based upon" a public disclosure of fraud in specified hearings, reports or investigations or in the news media generally. *See* 31 U.S.C. § 3730(e)(4) (1994) (set forth in full above under "Statutory Provisions Involved").

**B. Factual Background**

Petitioner Mistick, the relator here, was the general contractor for renovation work, including lead-based paint abatement work, performed at two public housing projects of Respondent HACP, known as the "Bedford" and "Addison" projects. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 379 (3d Cir. 1999) (Appendix A, at 1a, 4a). Both construction projects were administered by HACP, and were financed, in part, by the United States Department of Housing and Urban Development ("HUD"). *See id.* (Appendix A, at 4a). Respondent Astorino was the architectural firm that developed for HACP the specifications for the renovation work, including lead-based paint abatement work. *See id.* (Appendix A, at 4a).

In its complaint under the Act, Mistick alleges that Respondents made false statements to HUD in 1990 and 1992, in order to obtain HUD funding for certain cost increases at the Bedford and Addison projects. *See id.* (Appendix A, at 4a). The cost increases and related false statements involved a change of the product originally specified for the lead-based paint abatement work at the Bedford and Addison projects. *See id.* at 379-381 (Appendix A, at 4a-10a).

Respondents' false statements were contained in certain letters from Respondents to HUD, and were made, at least in part, in response to written inquiries by HUD as to the basis for the specifications change. *See id.* at 380-381 (Appendix A, at 6a-10a). Those letters were discovered by Mistick in or about October 1993, pursuant to a Freedom of Information Act ("FOIA") request made by David M. Priselac, Esq., counsel for Mistick (the "Priselac FOIA Request"). *See id.* at 381 (Appendix A, at 10a). Mistick knew Respondents' statements to HUD to be false based on the knowledge Mistick had acquired while performing its contracting duties at the Bedford and Addison projects. *See id.* at 379 (Appendix A, at 4a-6a).

Mistick's knowledge of the true state of facts had formed the basis for a July 1991 Pennsylvania state court contract action brought by Mistick against HACP (the "Mistick State Action"). In the Mistick State Action, Mistick sought to recover the damages it suffered resulting from the delay and disruption caused by the lead abatement specifications change. *See id.* at 381 (Appendix A, at 8a-9a). Copies of certain of Respondents' letters to HUD, which were originally produced by HUD independently of the Mistick State Action, were also later produced by Respondents in discovery in the Mistick State Action. The Mistick State Action also uncovered additional documentary and testimonial evidence regarding the knowing falseness of Respondents' statements to HUD.

Indeed, as a matter of logic, virtually no person other than Mistick would have understood the context in which the statements were made, known that the statements

were false, or even looked for the statements in the first place.[2]

## C. Proceedings Below and Basis for Jurisdiction in the District Court

Mistick filed its initial *qui tam* complaint under the Act in the District Court against Respondents on November 20, 1995, under seal as required by the Act. *See* 31 U.S.C. § 3730(b)(2) (1994).[3] As also required by the Act, Mistick provided written disclosure of substantially all material evidence and information to the United States. *See id.* The basis for federal jurisdiction in the District Court was that Mistick's claims arose under the laws of the United States, namely the Act, *see* 28 U.S.C. § 1331 (1994), and that Mistick had satisfied the foregoing information disclosure provisions of the Act.

On July 9, 1996, the District Court granted the United States' motion of election to decline intervention in this case, and ordered the complaint unsealed and served on Respondents. *See* 31 U.S.C. § 3730(b)(2), (b)(4) (1994). After service of the complaint, Respondents moved to

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[2] *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) ("[i]t is clear, however, that the present relator, Mistick, is nothing like the opportunistic and parasitic relator. . . . Rather, Mistick plausibly alleges (but has not had the opportunity to prove) that it learned of defendants' fraud well before it was 'publicly disclosed' in state-court litigation. . . .") (Appendix A, at 52a-53a).

[3] Prior to filing its complaint, Mistick met with the Government and voluntarily provided the information on which the allegations in this action are based. *See* 31 U.S.C. § 3730(e)(4)(B) (1994).

dismiss, which motion was granted by the District Court on March 26, 1997, solely on the basis of § 3730(e)(4).

Mistick filed its Notice of Appeal in the Third Circuit on April 23, 1997. By opinion dated July 30, 1999, a divided Third Circuit panel, over the dissent of Chief Judge Becker, affirmed the judgment of the District Court. *See Mistick*, 186 F.3d at 378-389 (Appendix A, at 1a-29a); *id.* at 389-403 (Becker, C.J., dissenting) (Appendix A, at 30a-62a). On August 13, 1999, Mistick filed Petitions for Rehearing and for Rehearing En Banc, which were denied by order dated September 9, 1999.

**D. The Third Circuit Opinion**

The Third Circuit panel divided in its decision essentially along the lines of division that exist among the United States Courts of Appeals. Under the panel majority view, the Mistick Action was "barred" because the action was "supported by" or "substantially similar to" publicly disclosed information and "the relator's independent knowledge of the information is irrelevant". See id. at 385-388. Under Chief Judge Becker's view, the action was not barred because, among other reasons, it was not "derived from" publicly disclosed information. *Id.* at 395.

According to the Third Circuit panel majority, both the misrepresented facts (X) and the true facts (Y) were disclosed in discovery in the Mistick State Action, and accordingly both sets of facts had been "publicly disclosed" in a "civil hearing" within the meaning of § 3730(e)(4)(A) under Third Circuit precedent. *See Mistick*, 186 F.3d at 385 (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991)) (Appendix A, at 19a).

However, the panel majority recognized that Mistick knew both the true and misrepresented facts independently, well before republication of the same in the Mistick State Action. Mistick's original and independent knowledge was gained, as to the true set of facts, primarily as a result of Mistick's performance of its general contracting work on the Bedford and Addison projects. Mistick acquired its knowledge of the false set of facts from HUD's response to the Priselac FOIA Request. *See id.* at 379, 381, 383, 385 (Appendix A, at 5a, 6a, 9a, 10a, 13a, 19a). Accordingly, the panel majority addressed the issue of whether Mistick's *qui tam* action, in fact, was "based upon" the public disclosures within the meaning of § 3730(e)(4)(A). *See id.* at 385 (Appendix A, at 20a).

The panel majority concluded that the phrase "based upon" should be interpreted to mean "supported by" or "substantially similar to," so that "the relator's independent knowledge of the information is irrelevant." *See id.* at 385-388 (citations omitted) (Appendix A, at 20a-27a). In this connection, the panel majority expressly decided to disregard what it admitted was the plain meaning of the phrase "based upon," namely, "actually derived from." *See id.* (Appendix A, at 20a-27a). As noted by the panel majority, the interpretation of the term "based upon" as used in Section 3730(e)(4)(A) is the subject of split decisions within the federal circuits. *See id.* (Appendix A, at 20a-27a).

The panel majority also held that HUD's response to the Priselac FOIA Request, through which Mistick initially discovered Respondents' fraudulent letters to HUD, itself constituted a "public disclosure" in an "administrative report" or in an "administrative investigation," as those

terms are used by § 3730(e)(4)(A). *See id.* at 383-385 (Appendix A, at 13a-18a). The import of this holding is to bar within the Third Circuit *qui tam* actions based upon information acquired through the FOIA. This dramatic expansion of the bar to private litigants has not been addressed by any other United States Court of Appeal.[4]

Lastly, the panel majority determined that Mistick could not be an "original source" under § 3730(e)(4)(B), on the grounds that Mistick gained its knowledge of the misrepresented facts through a § 3730(e)(4)(A) public disclosure, *i.e.*, HUD's response to the Priselac FOIA Request. *See id.* at 388-389 (Appendix A, at 27a-28a). At least one other federal circuit has held that a party that causes a public disclosure is not precluded from being an original source. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970 (9th Cir. 1999).

## REASONS FOR GRANTING THE PETITION

This case presents three important questions of federal law. Settlement of the questions presented is of vital importance to effectuate Congressional intent to combat fraud against the United States and to ensure that fraud against the United States is policed equally and effectively regardless of the jurisdiction in which the fraud occurs. For

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[4] In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 945 (1997), this Court did not reach the narrower question, answered affirmatively by the vacated underlying Ninth Circuit decision, of whether a response to a FOIA request constitutes a "public" disclosure.

these reasons, review on a writ of certiorari is appropriate. *See* Sup. Ct. R. 10(a) and 10(c).

By interpreting the phrase "based upon" in § 3730(e)(4)(A) to mean "substantially similar to," or "supported by," rather than according to its admitted plain meaning of "derived from," the panel majority interprets § 3730(e)(4)(A) as a bar to meritorious *qui tam* suits generated from the relator's original and independent knowledge. As stated by the Third Circuit, "the relator's independent knowledge of the information is irrelevant." *Mistick*, 186 F.3d at 385-388 (Appendix A, at 21a). The panel majority's interpretation of the "based upon" language conflicts with decisions of other United States Courts of Appeals addressing that language, making review on certiorari appropriate under Sup. Ct. R. 10(a), and with relevant decisions of this Court mandating that the *qui tam* language be given its plain and ordinary meaning, making review on certiorari appropriate under Sup. Ct. R. 10(c).

Second, the panel majority's holding that HUD's response to the Priselac FOIA Request was an "administrative report" or "administrative investigation" within the meaning of § 3730(e)(4)(A) similarly disregards the plain meaning of the statutory language. Indeed, the FOIA is not identified in or implied by the statute as a type of public disclosure to which the bar applies. The types of public disclosures identified are those in which the Government or news media are presumed to understand that a fraud has been perpetrated. Moreover, the panel majority's holding effectively prevents *qui tam* plaintiffs from using the FOIA, which is one of the most effective means of discovering or verifying a fraud that is being perpetrated on the Government. Review on certiorari is appropriate under Sup. Ct. R. 10(c).

Third, the panel majority effectively negates the "original source" provision of § 3730(e)(4)(B), under which a *qui tam* plaintiff may maintain its suit regardless of the applicability of § 3730(e)(4)(A). The panel majority creates an ambiguity where none exists in the statute, and holds circularly that where there has been a "public disclosure" of fraud under paragraph (A), then the relator cannot be an original source under paragraph (B), even though the relator itself caused the supposed public disclosure of the fraud in the first place. This interpretation stands in conflict with that of at least one other Court of Appeals, making review appropriate under Sup. Ct. R. 10(a).[5]

## I. This Case Presents Important Questions of Federal Law That Should Be Settled by This Court

The split in decision among the Federal Circuit Courts is a basis alone to grant this Petition for Certiorari. Review by this Court is also merited because Congress has long viewed the *qui tam* provisions of the Act, including liberalization of the private relator bar in 1986, as vitally important to rooting out fraud against the United States. Any unduly broad interpretation of the private relator bar benefits dishonest contractors. Accordingly, it is vital that this Court address the operative language in § 3730(e)(4) at issue in this case.

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[5] Petitioner understands that recently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, *cert. granted*, 119 S. Ct. 2391 (Jun. 24, 1999), this Court requested briefing and heard argument on the issue of whether a private person has standing to maintain a *qui tam* action.

Indeed, in a recent letter to the Attorney General of the United States, Senator Charles E. Grassley and Congressman Howard L. Berman, the principal sponsors of the 1986 amendments to the Act, sharply criticize the type of broad interpretation of § 3730(e)(4) rendered by the Third Circuit panel majority in this case, as defeating both the language and intent of Congress in drafting that provision and thereby damaging the United States' anti-fraud efforts. *See generally* Letter From Senator Charles E. Grassley and Congressman Howard L. Berman to Janet Reno, Attorney General, 145 Cong. Rec. E1540-01, E1546-01 (July 14, 1999) (the "Grassley/Berman Letter") (Appendix F, at 94a, 98a).[6]

The scale of fraud against the United States more than justifies Congress' concerns. As of 1986, estimates of the amount of fraud committed against the United States ranged from hundreds of millions to more than $50 billion per year, with the Justice Department estimating that as much as ten percent of the federal budget was being drained

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[6] This Court has considered the views of legislative sponsors in addressing interpretive issues under the Act. *See United States v. Bornstein*, 423 U.S. 303, 309 & n.5 (1976); *United States v. McNinch*, 356 U.S. at 595, 599 & n.9 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 & n.10 (1943). Indeed, this Court has explained more generally that statements from legislative sponsors are to be accorded "substantial weight" in interpreting a statute, and has also indicated that even subsequent legislative history is to be considered valid in determining the "scope and purpose of" a statute. *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27, 535 (1982).

due to fraud.[7] One 1996 study estimated that as much as 5% of the total federal budget is drained by fraud, and that without the deterrent effect of the Act, approximately $656 billion would have been lost due to fraud over the 1987 to 1996 period.[8] Recent General Accounting Office and other studies indicate that waste, fraud and abuse consume over $200 billion of taxpayer funds each year, and that Medicare fraud alone amounts to approximately $20 billion annually.[9]

Although the Act originally contained no restriction on private relator actions, Congress inserted a jurisdictional bar into the statute in 1943, in response to perceived abuses by "parasitic" relators who simply copied Government indictments and added no information of their own.[10] That bar, later called the "government knowledge" bar, was interpreted to prevent a *qui tam* action simply if information about the fraud was possessed in a United States file,

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[7] *See* False Claims Act Amendments of 1986, S. Rep. No. 99-345, at 3 (1986) (citations omitted), *reprinted in* 1986 U.S.C.C.A.N. at 5267-5268.

[8] William L. Stringer, *The 1986 False Claims Act Amendments: An Assessment of Economic Impact* 6-10 (1996) (Appendix G, at 119a-124a).

[9] *See* 145 Cong. Rec. H12090-01, at H12093 (Nov. 16, 1999) (statement of Rep. Sessions); *id.* E2069-01, at E2069 (Oct. 7, 1999) (statement of Rep. Lazio).

[10] *See* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 Pub. Cont. L.J. 669, 673-79 (1998) (citing and discussing legislative history); Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 240-50 (1995) (same).

regardless of whether the relator knew of the information independently or whether the United States understood the significance of the information.[11]

Indeed, in some cases, such as the Seventh Circuit's decision in *Wisconsin v. Dean*, the government knowledge bar was held to apply even where the relator itself had informed the United States of the fraud in the first place.[12] Not surprisingly, the government knowledge bar caused the number of *qui tam* actions to drop off dramatically.[13]

In 1986, Congress amended the Act to replace the government knowledge bar with the present bar of § 3730(e)(4). It is manifestly clear that, in doing so, Congress intended not merely to eradicate the government knowledge bar, but also to generally invigorate the Government's anti-fraud efforts by increasing the number of private actions. *See Hughes Aircraft*, 520 U.S. at 950 (1986 amendments "permit[] actions by an expanded universe of plaintiffs"); S. Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5288-5289 (intent of 1986 amendments "to encourage more private enforcement suits"); *id.* at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289 ("much of the purpose of the *qui tam*

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[11] *See* Salcido, *supra* note 10, at 248-250 & nn.47-56 (citing and discussing cases); *see also* Grassley/Berman Letter, 145 Cong. Rec. at E1546 (Appendix F, at 100a).

[12] *See* Salcido, *supra* note 10, at 249-250 & nn.53-55 (discussing *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984)); Grassley/Berman Letter, 145 Cong. Rec. at E1546 (same) (Appendix F, at 100a).

[13] *See* Thompson, *supra* note 10, at 675 n.40; Salcido, *supra* note 10, at 258.

actions would be defeated unless the private individual is able to advance the case to litigation"); *see also id.* at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-5278 (discussing "unfortunate" interpretation of 1943 bar in *Wisconsin v. Dean*).[14]

Congress viewed increased availability of *qui tam* actions as having two related purposes. First, Congress intended to encourage those with information regarding fraud against the United States to come forward with that information. *See, e.g.*, H.R. Rep. No. 99-660, at 23 (1986) ("The purpose of the qui tam provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."); S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5266-5267 (purpose of amendments to "encourage any individual knowing of Government fraud to bring that information forward," and commenting that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds").

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[14] This Court has also recognized that, since the inception of the Act in 1863, Congress has viewed the private relator right of action as central to effectuating the Act's purposes of providing incentives for persons to bring forward information regarding fraud, spurring initiation of anti-fraud cases and adding the relator's resources to the United States' anti-fraud effort. *See Marcus*, 317 U.S. at 545-547 & nn.10 & 12; *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (describing the private relator action one of the oldest and "least expensive and most effective means of preventing fraud") (quoting *Marcus*, 317 U.S. at 541 n.5).

Second, Congress believed that more *qui tam* actions would assist (and even prod) the United States in acting against fraud. *See id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273 (private relators can "make a significant impact on bolstering the Government's fraud enforcement effort"); H.R. Rep. No. 99-660, at 18 (1986), and S. Rep. No. 99-345, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5267-5268 ("[M]ost fraud goes undetected" by Government auditors); S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5269 ("most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected"); *id.* at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 (Government may "neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason"); *id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272 (lack of adequate Government resources "perhaps the most serious problem plaguing effective enforcement" and the reason why promising information is "often left unaddressed"); *id.* at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 ("[T]he often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in a timely manner.").

Mistick is precisely the type of *qui tam* relator that Congress wanted to encourage via the 1986 amendments. Far from acting as a parasite, Mistick was the general contractor of the construction projects that gave rise to the false claims at issue here. Each essential element of Respondents' fraud was discovered through Mistick's own efforts. Indeed, as a result of its "insider" role, Mistick itself caused the supposed "public disclosure" of Respondents' statements, originally through the Priselac FOIA Request and later in discovery in the Mistick State Action. Mistick then brought its information regarding the

fraud to the United States and initiated this action, precisely as intended by Congress.

## II. The "Based Upon" Language of § 3730(e)(4)(A) Should Be Interpreted in Accordance With Its Plain Meaning

### A. The Panel Majority's Interpretation of the Phrase "Based Upon" Conflicts With Decisions of Other United States Courts of Appeals

The Third Circuit panel majority held that the phrase "based upon" in § 3730(e)(4)(A) should not be given its plain meaning of "derived from," but instead should be interpreted to mean "supported by" or "substantially similar to," so that "the relator's independent knowledge of the information is irrelevant." *See Mistick*, 186 F.3d at 385-388 (citations omitted) (Appendix A, at 20a-27a). In admittedly disregarding the plain language of the statute, the panel majority adopted the position taken by the D.C. and Ninth Circuits in interpreting the phrase "based upon" in that provision. *See id.* at 385-388 (citing *United States ex rel. Biddle v. Board of Trustees*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999), and *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997)) (Appendix A, at 21a-27a).[15]

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[15] The panel majority also cited *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), and *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *See Mistick*, 186 F.3d at 386 (Appendix A, at 21a). However, as noted by the Fourth Circuit,

*(Footnote continued next page . . .)*

However, other United States Courts of Appeals have either held or strongly indicated that the phrase "based upon" in § 3730(e)(4)(A) should be interpreted according to its plain meaning, *i.e.*, as "actually derived from." *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *see also United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) ("[t]he Fourth Circuit's interpretation of 'based upon' is the better on the grounds both of plain meaning and public policy," and is the "preferred" reading); *United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 40-41 (D. Mass.) (stating among other things that "[i]n light of the plain meaning of the words 'based upon,' this Court is inclined to agree with the Fourth Circuit"), *aff'd*, 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996).[16] Additionally, in his spirited dissent in the *Mistick* case, Chief Judge Becker of the Third Circuit also urged that the "based upon" phrase be interpreted according to its plain meaning, in accordance

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*Precision* and *Koch* do not truly address whether "based upon" should be interpreted to mean "derived from." *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348-1349 & n.8 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). Conversely, although not cited by the panel majority, the Sixth Circuit also has adopted the position that "based upon" means "supported by" or substantially similar to. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998) (citations omitted).

[16] In affirming the district court's opinion in *LeBlanc*, the First Circuit issued an unpublished opinion describing the district court's opinion as "well reasoned" and affirming the district court's judgment "for substantially the reasons elucidated in the opinion below." *See United States ex rel. LeBlanc v. Raytheon Co.*, No. 95-1263, 1995 WL 471105, at *1 (1st Cir. Aug. 9, 1995) (Selya, J.).

with the Fourth Circuit's approach in *Siller*. *See Mistick*, 186 F.3d at 394-400 (Becker, C.J., dissenting) (Appendix A, at 41a-56a).

B. The Panel Majority's Decision Conflicts With Decisions of This Court

The Third Circuit panel majority expressly decided to disregard what it admitted was the plain meaning of that phrase, namely, "actually derived from." *See Mistick*, 186 F.3d at 386-388 (Appendix A, at 21a-27a). In justification of this approach, and reflecting the same concerns voiced by the D.C. and Ninth Circuits, the panel majority stated that (1) the statute "does not reflect careful drafting or a precise use of language," and (2) a plain meaning interpretation of "based upon" would render the "original source" provision of § 3730(e)(4)(B) superfluous. *See id* (Appendix A, at 21a-27a). However, the panel majority's interpretive analysis directly conflicts with decisions of this Court and is plainly incorrect.

1. *Interpretive Decisions of This Court, Including Decisions Addressing the False Claims Act and "Poorly Drafted" Statutes*

This Court has warned against unduly restrictive interpretations of the *qui tam* provisions of the Act, in light of the clear historical Congressional intent to employ such actions as part of the United States' anti-fraud efforts. *See Marcus*, 317 U.S. at 540-542 & nn.4-5; *cf. United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (stating that this Court, in "various contexts," has "consistently refused" a "restrictive reading" of the reach of both the criminal and civil provisions of the False Claims Act) (citing *Marcus*). In

this context, this Court specifically has stated that fidelity must be maintained to the language chosen by Congress to describe the private relator right of action, regardless of the court's views of the desirability of such actions. *See Marcus*, 317 U.S. at 546-47 n.9.

Indeed, this Court consistently has ruled that unambiguous terms of any statute must be interpreted according to the plain, ordinary and natural meaning of the terms chosen by Congress. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. James*, 478 U.S. 597, 604 (1986); *Rubin v. United States*, 449 U.S. 424, 429-430 (1981).

In this connection, this Court has specifically rejected the suggestion, made by the Third Circuit panel majority, that supposedly poor or forgetful drafting of a statute gives a court the license to disregard the plain meaning of the terms chosen by Congress and to revise the statute. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (commenting that "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined and not for this Court"); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("the fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanch to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"); *cf. Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 45-47 (1979) ("Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'").

This Court has even gone so far as to state that the canon of plain language interpretation is the "cardinal canon before all others," and to suggest that while superfluous interpretations are "disfavored," the doctrine of avoiding superfluous interpretations may "not apply" so long as the statutory language is clear and the result is not "repugnant." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *see also id.* ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and that "[i]t would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation") (citations omitted).

2. *Decisions of This Court Addressing the Phrase "Based Upon" in Other Federal Law Contexts*

This Court has interpreted the phrase "based upon" according to its plain and ordinary meaning in other federal law contexts, and accordingly has favored the type of "derived from" meaning rejected by the Third Circuit panel majority. In describing the "independent source" exception to the exclusionary rule under the Fourth Amendment, this Court has stated that the United States, in order to have the evidence in question admitted, must prove that the evidence was "based upon" some source other than the illegal source. *See United States v. Wade*, 388 U.S. 218, 240 (1967) (citation omitted). Further elaborating, this Court made clear in *Wade* that such a test is keyed to whether the evidence had an "independent origin," and whether the evidence "has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 240 n.31, 241 (citations omitted).

Similarly, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court addressed the issue of whether a lawsuit was "based upon a commercial activity," as referred to in the Foreign Sovereign Immunities Act of 1976, and therefore permitted to be maintained against a foreign sovereign under that statute. This Court stated that "guidance is hardly necessary" to determine the meaning of that phrase, and looked to dictionary definitions to determine that meaning in the context of the issue presented. *Id.* at 355-359 (citations omitted).[17]

### 3. *Creation of Ambiguities Where None Exist*

This Court has cautioned that courts are not to create ambiguities, where none in fact exist, as an excuse for departing from the plain language of a statute. *See United States v. James*, 478 U.S. 597, 604-605 (1986) (admonishing against using "ingenuity to create ambiguity") (citations omitted); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) (admonishing against "effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists"). In this case, however, the Third Circuit panel majority has done just that. Contrary to the panel

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[17] Congress, too, has used the phrase "based upon" in other statutes as meaning "derived from." The Copyright Act defines a "derivative work" as a work that is "based upon one or more preexisting works." 17 U.S.C. § 101 (1994). Authoritative treatises have characterized this definition as meaning that the derivative work is "substantially copied from a prior work." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.01, at 3-3 (1997).

majority's claim, a plain language reading of "based upon" in § 3730(3)(4)(A), to mean "derived from," does *not* render the original source provision of § 3730(e)(4)(B) superfluous.

As an initial matter, it may be more confusing than helpful to view the "original source" provision of § 3730(e)(4)(B) as an "exception" that can be rendered "superfluous" by an interpretation of § 3730(e)(4)(A). Instead, the original source provision may be a mere safe harbor, useful whenever a relator could more easily prove itself an "original source" than disprove a causal link between the public disclosures and its *qui tam* action. *See Mistick*, 186 F.3d at 400 (Becker, C.J., dissenting) (Appendix A, at 54a-55a).

In any event, the "based upon" phrase in § 3730(e)(4)(A) may be interpreted according to its plain meaning of "derived from" *without* rendering the original source provision of § 3730(e)(4)(B) superfluous, even if the latter provision is viewed as an exception to the former. The interpretive logic employed by the Third Circuit panel majority, as well as by the D.C. and Ninth Circuits, overlooks the fact that the phrase "based upon" could reasonably be interpreted to mean based "in part" upon.[18] *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) (Appendix A, at 53a-54a); *Precision*, 971 F.2d at 552 (holding that "an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is

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[18] As noted by the Fourth Circuit, the question of whether "based upon" means "derived from" logically precedes and is distinct from the question of whether an action based "in part" on a qualifying public disclosure counts under the statute. *See Siller*, 21 F.3d at 1349.

nonetheless 'based upon' such allegations or transactions"); *see also Farmington*, 166 F.3d at 863-864 (while reserving question of based "in part" upon, nevertheless holding that a claim "which both depends essentially upon publicly disclosed information and is actually derived from such information is 'based upon' a public disclosure").

When it is realized that the phrase "based upon" in § 3730(e)(4)(A) could mean "actually derived in part from," the supposed superfluousness of § 3730(e)(4)(B)'s original source provision vanishes. For example, suppose that Mistick derived this action partly from its own knowledge of both the true and false state of facts (X and Y), and partly from a qualifying statutory public disclosure of both those essential elements. Or, suppose that a relator independently knows of one essential element of a fraud (X or Y), but learns the rest through a news article which describes all the essential elements (X and Y). *See* Thompson, *supra* note 10, at 701-703.

In both of these cases, the relator could still be subjected to § 3730(e)(A) under a "derived from" interpretation of "based upon," but nevertheless qualify under existing case law as a § 3730(e)(4)(B) "original source." *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (relator is original source where it has direct and independent knowledge of any essential element, X or Y); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) (relator is original source where it has direct and independent knowledge of "substantive information about the particular fraud").

## III. A Government Response to A FOIA Request Does Not Constitute An "Administrative Report" or "Administrative Investigation" Under the Plain Language or Intent of § 3730(e)(4)(A)

The panel majority also held that HUD's response to the Priselac FOIA Request, through which Mistick initially discovered letters containing misrepresentations to HUD, constituted a "public disclosure" in an "administrative report" or in an "administrative investigation," as those terms are used by § 3730(e)(4)(A). *See Mistick*, 186 F.3d at 383-385 (Appendix A, at 13a-18a). Significantly, however, the FOIA is nowhere mentioned or even implied in § 3730(e)(4)(A) as a kind of disclosure to which the bar applies, even though Congress could have easily added the FOIA to the list of qualifying disclosures had it so desired. Only by stretching the language of that provision well beyond its ordinary meaning is the panel majority able to conclude that a response to a FOIA request constitutes a disclosure in an "administrative report" or "administrative investigation" for purposes of § 3730(e)(4)(A).

Indeed, in addressing "public disclosure" language contained in the Consumer Product Safety Act, this Court specifically indicated that it would not view a FOIA request as falling within a statutory reference to "disclosures in the course of an administrative . . . proceeding." *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 & n.5 (1980); *id.* (Congress could have listed a FOIA request in the provision had it so intended).

The Third Circuit panel majority, however, gives the term "report" the very broad meaning of "something that gives information." *See Mistick*, 186 F.3d at 383

(Appendix A, at 15a). In fact, however, as a review of dictionary definitions reveals, the true thrust of dictionary definitions of "report" is an official or formal statement or account of facts, usually detailed and formal. *See* Black's Law Dictionary 1300 (6th ed. 1990); The American Heritage Dictionary 1049 (2d College ed. 1985); Webster's New Collegiate Dictionary 973-74 (1981).

Similarly, the panel majority also contends that an "investigation" is comparable to the very broad term "search." *See Mistick*, 186 F.3d at 384 (Appendix A, at 17a). In fact, however, as a review of dictionary definitions reveals, the true thrust of "investigation" or "investigate," as pertinent here, involves more than a mere search, instead describing patient, detailed, systematic and careful inquiry, observation or examination. *See* Black's Law Dictionary 825 (6th ed. 1990); The Compact Oxford English Dictionary 874 (2d ed. 1991); The American Heritage Dictionary 675 (2d College ed. 1985); Webster's New Collegiate Dictionary 603 (1981).

In this case, in response to the Priselac FOIA Request, HUD's only actions were that an employee of HUD in HUD's Pittsburgh Regional Office engaged in the purely ministerial acts of (1) identifying HUD's files on the Bedford and Addison projects located in that office, and (2) making those files available to Mistick for inspection and copying. Copies of Respondents' letters to HUD were the only products of the FOIA request.

Accordingly, as noted by Chief Judge Becker in his dissent, HUD's activities involved no real "investigation," nor did they involve any analysis, statement or account by HUD as would be required to come within the true sense of the term "report." *See Mistick*, 186 F.3d at 393-394

(Becker, C.J., dissenting) (Appendix A, at 40a); *see also id.* (citing applicable FOIA provisions establishing that FOIA requires only a "search," not an "investigation," and involves the actual "records" themselves, not any "report") (Appendix A, at 40a). At most, HUD's actions in this case constituted a mere "collection" or "compilation" of documents after a search.[19]

Significantly, the panel majority's interpretation of HUD's response to the Priselac FOIA Request, as resulting in an administrative "report" or "investigation" for purposes of § 3730(e)(4)(A), is tantamount to reinstating the government knowledge bar Congress intended to eliminate in the 1986 amendments to the Act. *See* Part I, *supra*. Under that interpretation, § 3730(e)(4)(A) would be triggered whenever any materials possessed by the United States come into the possession of a relator through the FOIA, regardless of whether the relator was acting parasitically or whether the United States understood the significance of the information it possessed. *See also* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (criticizing broad judicial interpretations of the "public disclosure" items enumerated in § 3730(e)(4)(A)) (Appendix F, at 98a-110a).

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[19] In distinction to a "report," a "collection" or "compilation" is ordinarily thought of as a simple selection or arrangement of materials authored or produced by some other party. *See* Black's Law Dictionary 263-64, 284 (6th ed. 1990); 1 Bouvier's Law Dictionary 573 (1914); The Compact Oxford English Dictionary 286-87, 301 (2d ed. 1991); Webster's New Collegiate Dictionary 218, 228 (1981).

## IV. The Third Circuit Opinion Eviscerates the "Original Source" Provision of the Act and Defeats the Congressional Intent Behind § 3730(e)(4), in Further Conflict With Other Courts of Appeals

According to the panel majority, Mistick cannot qualify as an original source under § 3730(e)(4)(B) because it gained its knowledge of the misrepresented facts (X) through a § 3730(e)(4)(A) public disclosure, *i.e.*, the response to the Priselac FOIA Request. *See Mistick*, 186 F.3d at 388-389 (Appendix A, at 27a-28a). Yet the panel majority's approach to the statute is entirely circular -- the very same thing that is said to make § 3730(e)(4)(A) initially applicable to Mistick is then *also* used to deny Mistick the original source safe harbor or exception of § 3730(e)(4)(B).

The panel majority has rendered either paragraph (A) or (B) of § 3730(e)(4) superfluous. The panel majority's broad, non-plain language interpretation of "based upon" may prevent parasitic suits, but does so at the expense of *also* barring the non-parasitic suits that Congress specifically intended to encourage in 1986. *See* Part I, *supra*. Congressional intent might be addressed through a proper interpretation of the "original source" provision.[20]

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[20] In their recent letter to the Attorney General, Senator Grassley and Congressman Berman specifically emphasize that Congress intended the 1986 amendments to encourage non-parasitic private relator suits. *See* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (Appendix F at 98a, 110a).

In other circuits that have adopted the panel's broad view of the term "based upon," the original source provision nevertheless has been interpreted to effectuate Congressional intent. *See, e.g., Springfield*, 14 F.3d at 657 (relator is original source where it has direct and independent knowledge of any essential element, X or Y). In fact, as pointed out by Chief Judge Becker in his *Mistick* dissent, the panel majority's treatment of the original source provision is inconsistent in this regard with the Third Circuit's own precedent. *See Mistick*, 186 F.3d at 399 (Becker, C.J., dissenting) (discussing *Stinson*) (Appendix A, at 53a); *Stinson*, 944 F.2d at 1160 (relator is original source so long as it has direct and independent knowledge of "substantive information about the particular fraud"). The Ninth Circuit specifically has held that a relator still qualifies as an original source where the relator itself caused the supposed "public disclosure" of the fraud. *Lockheed Missiles & Space Co.*, 190 F.3d at 970; *see also* Grassley/Berman Letter, 145 Cong. Rec. at E1546-1547 (original source provision should be available to relators combining their own experience with information obtained from a FOIA request or other public documents).

By ignoring that Mistick itself brought Respondents' false statements to light through the Priselac FOIA Request, and that the United States did not know those statements to be false until Mistick explained the circumstances, the panel majority's interpretation of the original source provision effectively reinstates the pre-1986 government knowledge bar, under which a relator could not maintain a suit even though it was the relator that had disclosed the fraud to the United States in the first place. *See* Part I, *supra*; *Mistick*, 123 F.3d at 400 (Becker, C.J., dissenting) (Appendix A, at 55a).

## CONCLUSION

For all the foregoing reasons, this Court should grant Mistick's Petition for Writ of Certiorari.

Respectfully submitted,

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*Counsel for Petitioner*

DECEMBER 8, 1999

(2) Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

MISTICK PBT,

*Petitioner,*

vs.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, *et al.*,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT UNDER SUP. CT. R. 29.6

Mistick is a Pennsylvania business trust and is not a "corporation" under Pennsylvania state law. In any event, Mistick has no parent or subsidiary company ("subsidiary" being defined as ownership by Mistick of greater than 50%).

**APPENDIX A**

Filed July 30, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 97-3248

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UNITED STATES OF AMERICA ex rel.
MISTICK PBT and MISTICK PBT

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH; L.D. ASTORINO & ASSOCIATES, LTD. (formerly known as L.D. ASTORINO ARCHITECTS, INC.); ASTORINO BRANCH ENVIRONMENTAL INC.; ASTORINO BRANCH ENGINEERS; ERNEST E. MILLER, individually; DAVID B. WASHINGTON, individually; LOUIS D. ASTORINO, individually; DENNIS L. ASTORINO, individually; PATRICK I. BRANCH, individually; BERNARD J. QUINN, individually

Mistick PBT,

Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. No. 95-cv-01876)
(District Judge: Hon. Alan N. Bloch)

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Argued June 9, 1998

Before: BECKER, *Chief Judge*, ALITO and ALDISERT, *Circuit Judges*

(Opinion Filed: July 30, 1999)

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**OPINION OF THE COURT**

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ALITO, *Circuit Judge*:

This appeal arises from a qui tam action based on the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. (1994). The District Court dismissed the complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A), which provides that no court has jurisdiction over a False Claims Act qui tam action that is based on certain public disclosures unless the action is brought by an "original source." We agree with the District

Court that subject matter jurisdiction was lacking, and we therefore affirm.

I.

A. The qui tam action at issue here was filed by Mistick PBT, a Pittsburgh area construction company. Named as defendants were the Housing Authority of the City of Pittsburgh ("HACP") and L.D. Astorino & Associates, Ltd. an architectural firm, as well as individual employees of the HACP and Astorino & Associates. The complaint asserted that the defendants made false claims to the United States Department of Housing and Urban Development (HUD) for the cost of lead-based paint abatement work at the HACP's Bedford and Addison housing projects. Astorino was the architectural firm that developed the specifications for the lead-based paint abatement work, as well as the larger renovation projects of which this work formed a part, and Mistick was the general contractor for all of this work.

Since August 1986, HUD regulations have required lead based paint abatement work to be performed at HUD-associated housing. *See* 24 C.F.R. §§ 35.20 - 35.24 (1998). Such abatement may be achieved either by removing the paint or covering it with an "encapsulant" that covers and prevents exposure of the lead-based paint. *See* 24 C.F.R. S 35.24.

Astorino's original specifications for the lead abatement work at issue were submitted in approximately April or June of 1989 and provided for encapsulation using a product called "Glid Wall" that was manufactured by the Glidden Paint Company. According to Mistick's

complaint, Mistick bid and later performed its work at the two projects on the basis of Astorino's specifications, including the Glid Wall specification. Mistick submitted its bids in June and July of 1989, and after those bids were accepted and contracts were executed, Mistick began work on the Addison project by December 1989 and on the Bedford project by January 1990.

Although Astorino's specifications called for the use of "Glid Wall" as an encapsulant, Glidden had begun recommending against the use of this product for this purpose some time earlier. A Glidden Product Updates Bulletin dated April 1988 stated:

> [GLIDDEN] WILL NOT RECOMMEND OR SELL ANY PAINT PRODUCT OR SHEET MATERIAL, SUCH AS GLID-WALL SYSTEM OR VINYL WALL COVERING, FOR USE OVER LEAD CONTAINING MATERIALS WHERE THE PURPOSE OF THE APPLICATION IS TO SEAL OR OTHERWISE RENDER THE AFFECTED AREA NON-HAZARDOUS.

JA 79.[1]

In June 1988, a firm of "protective coatings (paint) consultants" wrote to an Astorino employee that "Glidden Company has no desire to warrant [the Glid-Wall System] as a lead abatement product, and therein lay their admonition regarding its use for that purpose." JA 82. According to the affidavit of D. Thomas Mistick, a

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[1] "JA" refers to the Joint Appendix.

principal of Mistick PBT, representatives of Astorino, the HACP, and Mistick attended a meeting on January 5, 1990, at which a Glidden representative reiterated the warning contained in the April 1988 Products Update Bulletin. JA 547. In addition, it appears that, on January 23, 1990, Glidden sent Astorino a letter advising that "the Glidwall System can not be consider (sic) a method for lead abatement." JA 450.

In May 1990, Astorino revised its specifications for the Bedford and Addison projects and provided for the use of a lead encapsulant called Zomat instead of Glid-Wall. This change was preceded by a series of letters from Astorino to the HACP. On February 14, 1990, Dennis Astorino, a vice- president of the architectural firm, wrote to Ernest Miller, the HACP's director of development, and attached a letter from Astorino's certified industrial hygienist stating that his company was "still of the opinion that the Glidwall System is the most cost effective method of physical compliance with the HUD criteria," although "an increased element of risk would be associated with the use of the Glid-Wall System since the manufacturer, Glidden, indicates the Glid-Wall System is not to be considered as a method for lead abatement." JA 449. Dennis Astorino's cover letter requested a prompt decision by the HACP regarding the method of abatement it wished to use--either encapsulation using Glid-Wall or some other product or the removal of the lead paint. Id.

On April 23, Dennis Astorino again wrote to Miller and summarized the events that had resulted in the original specification of Glid-Wall. Among other things, the letter stated that Astorino's consultants had advised the firm that "Glid-Wall was the encapsulating system of choice" but

that Glidden "no longer recommend[ed] their product as a lead base paint encapsulate and, in fact, [was] actively advising against it's (sic) use." JA 435. The letter added: "We understand this was do (sic) to potential corporate liability concerns." Id. The letter concluded by stating that the field of alternative encapsulants had been narrowed to Zomat. JA 436.

On April 24, Dennis Astorino wrote another letter to Miller in which he again stated that Glidden "no longer guarantees [Glid-Wall] for use as a lead base paint encapsulate" and again expressed the view that Zomat was then "the best solution to the problem of encapsulization." JA 434. After observing that Zomat could not have been called for in the original specifications because it had only recently been marketed as an encapsulant, the letter requested additional funding of approximately $750,000 for the Bedford project alone. Id.

Seeking to have HUD fund these cost increases, the HACP sent several letters to HUD in 1990 and 1992. On April 27, 1990, David Washington, the HACP's executive director, wrote to John Pisano, the manager of HUD's Pittsburgh office, and stated that the HACP needed additional funding for the Bedford project because Glidden "no longer recommends" Glid-Wall as a lead encapsulant. This letter had several attachments, including the February 14, April 23, and April 27 letters from Astorino to the Authority. JA 418-19.

On January 1, 1992, Miller wrote to Paul LaMarca, Acting Director of the Public Housing Division of HUD's Pittsburgh office, and requested additional funding from HUD for the Bedford project. Miller cited the fact that

Glidden no longer recommended Glid-Wall as an encapsulant and that new regulations required "additional worker protection methods." JA 457.

On July 1, 1992, in response to LaMarca's request for more information, Washington wrote to LaMarca and stated that "Glidwall became unacceptable as a LBP [lead-based paint] encapsulant because the Company informed the Architect by letter (1/23/90) that 'the Glidwall System can not be consider (sic) a method for lead abatement,' in spite of the fact that the system met HUD requirements in effect at the time and that the Baltimore Housing Authority was using it for this purpose." JA 464-65. Apparently referring to the situation at the time of the original specifications, the letter added:

> To our knowledge, there was no information available to suggest that the Glidwall System was not approved by Glidden for its intended use as a LBP encapsulant.

JA 465.

On July 24, 1992, HUD informed the HACP that it was approving $253,622.11 in additional funds for lead encapsulation on the Bedford project. JA 469.[2]

B. Meanwhile, in July 1991, Mistick had filed suit against the HACP in the Court of Common Pleas of

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[2] Mistick alleges that the HACP received additional funds for the Bedford and Addison projects through HUD's annual budget process.

Allegheny County, claiming that the HACP was liable to Mistick under their contract for delay damages resulting from the change in the lead-abatement specifications for the Bedford and Addison projects. The HACP then filed a third-party complaint for indemnification and contribution against Astorino, and Mistick subsequently moved to amend its complaint to add a direct claim of fraud against Astorino. In this proposed amended complaint, Mistick alleged that (1) Astorino knew at the time it developed the original specifications for the Bedford and Addison projects that Glidden did not recommend Glid-Wall as a lead-based paint encapsulant, (2) Astorino nonetheless specified GlidWall for lead abatement, (3) Astorino knew or should have known that this specification would delay and increase the cost of the renovation work, and (4) the Bedford and Addison projects were both delayed and Mistick suffered damages as a result. JA 226-27. In the alternative, Mistick alleged that the HACP knew that Glid-Wall was unsuitable for use a lead-based paint encapsulant but that it directed Astorino to specify this product anyway, knowing that this would cause delay and increased expense. JA 227. The Court of Common Pleas denied Mistick's motion to amend its complaint because, among other things, the statute of limitations had run on Mistick's claim against Astorino, and the Court dismissed Astorino as a third-party defendant.

Dennis Astorino gave a deposition in the state court action in which he acknowledged that the Astorino firm knew, prior to the submission of the original Bedford and Addison specifications, that Glidden did not recommend the use of Glid-Wall as an encapsulant. JA 99-100. Louis Astorino, another principal of the firm, likewise stated in a deposition that the firm was aware that Glid-Wall had

"never" been warranted as a lead-based paint encapsulant, but that he looked at Glid-Wall "as a product approved by HUD for this situation" and that "HUD never asked for a warranty for lead based paint abatement." JA 85-87. Mistick's suit against the HACP was eventually settled in May 1996.

C. While its suit against the HACP was pending in state court, Mistick began what it terms "an investigation ... undertaken ... for the purpose of gathering information on the HACP's relationship with HUD, which investigation was entirely separate and distinct from and independent of the [suit in state court]." Appellant's Br. at 11. This investigation was supposedly prompted by "a series of serious administrative problems and construction disputes Mistick and other contractors were experiencing, with both the HACP and Astorino, on various HUD-associated public housing project construction jobs in the Pittsburgh area." JA 539.

As part of this investigation, Mistick's attorney, David M. Priselac, Esq., filed a Freedom of Information Act ("FOIA") request with HUD in September 1993, and in response, HUD released several files for Pittsburgh-area HUD-funded projects, including the Bedford and Addison projects. These files included the Authority's letters to HUD, dated April 27, 1990, January 1, 1992, and July 1, 1992, as well as the letters from Astorino to the HACP that were attached to the April 27 letter. Mistick viewed the letters submitted to HUD as containing false claims regarding the Glid-Wall matter.

D. In November 1995, Mistick filed under seal this qui tam action in its own name and on behalf of the

United States. Mistick's complaint alleged that two false claims had been presented to the government. The first claim involved the original specifications, which called for the use of Glid-Wall as an encapsulant even though certain defendants allegedly knew that it was not suited for that purpose. The second claim concerned the HACP's request for additional funding to pay for part of the cost of switching to Zomat as the encapsulant and the allegedly false statements made regarding the reasons for the switch. Based on each of these two claims, the complaint asserted three separate causes of action: for presentation of a false claim, in violation of 31 U.S.C. § 3729(a)(1); for making or using a false record or statement, in violation of 31 U.S.C. § 3729(a)(2); and for conspiring to defraud the government, in violation of 31 U.S.C. § 3729(a)(3).

In July 1996, the District Court granted the Government's motion to decline intervention and ordered that Mistick's complaint be unsealed and served on the HACP and Astorino. The HACP and Astorino filed separate motions to dismiss, in which they asserted lack of subject matter jurisdiction. In March 1997, the District Court dismissed for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A), which, as noted, provides that no court has jurisdiction over a False Claims Act qui tam suit that is based on certain specified types of public disclosures unless the action is brought by an "original source." The District Court held that this jurisdictional bar applied because Mistick's action was based on information obtained by Mistick pursuant to a FOIA request and discovery in the state court proceeding and because Mistick did not qualify under the Act's "original source" exception. Mistick then took this appeal.

II.

The background of the False Claims Act's qui tam provision has been discussed in detail in prior opinions. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 738 (3d Cir.1997); *United States ex rel. Stinson v. Prudential Insurance Company*, 944 F.2d 1149, 1152-54 (3d Cir.1991); *id.* at 1162-68 (Scirica, J., dissenting). In brief, the qui tam provision "permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the Government. Prior to 1986, such suits were barred if the information on which they were based was already in the Government's possession." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941 (1997). In 1986, Congress sought "[t]o revitalize the qui tam provisions," *Stinson*, 944 F.2d at 1154. After considering several alternatives, *see Stinson*, 944 F.2d at 1163-68 (Scirica, J., dissenting), Congress enacted 31 U.S.C. § 3730(e)(4)(A), which provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office (sic) report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

As previously noted, the District Court held that this provision bars Mistick's suit. Mistick argues that the District Court's decision rests on three erroneous legal

determinations. First, Mistick contends that the disclosure of information in response to the Priselac FOIA request was not one of the kinds of public disclosure that trigger the jurisdictional bar set out in 31 U.S.C. § 3730(e)(4)(A). Second, Mistick maintains that its state- court suit did not involve the same "allegations" or "transactions" as its later qui tam action. Third, Mistick argues that it fell within the "original source" exception.

A. **The FOIA response.** As noted, the qui tam provision refers to "the public disclosure of allegations or transactions in a criminal, civil, or administrative, or Government Accounting Office (sic) report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). Thus, in order to fall within this language, a disclosure (1) must be "public" and (2) must occur in one of the specified contexts. HUD's response to the Priselac FOIA request satisfies both of these requirements.

First, the disclosure of information in response to a FOIA request is a "public disclosure." The Freedom of Information Act states that "[e]ach agency shall make available to the public " certain specified categories of information. 5 U.S.C. § 552(a)(emphasis added). The Act's "central purpose" is to ensure that government activities are "opened to the sharp eye of public scrutiny." *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 774 (1989)(emphasis added). In *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), the Supreme Court held that the disclosure of information pursuant to the FOIA constitutes a "public disclosure" within the meaning of the Consumer Product

Safety Act, 15 U.S.C. § 2055(b)(1), and the Court observed:

> [A]s a matter of common usage the term "public" is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of [the Consumer Product Safety Act].

447 U.S. at 108-09 (emphasis added). We see no sound basis for construing the term "public disclosure" any more narrowly here than the Supreme Court did in *GTE Sylvania*. We therefore conclude that HUD's response to the Priselac FOIA request was a "public disclosure."[3]

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[3] The dissent argues that information produced pursuant to a FOIA request is not publicly disclosed because it is provided only to the requester, who is not obligated to turn it over to others. Dissent at 28-29. The dissent therefore contends that the information is not "publicly accessible," *id.* at 28, and thus seems to suggest that "public disclosure" means making information accessible.

We disagree with the dissent that information available under FOIA is not "publicly accessible"; on the contrary, such information is readily accessible to any member of the public who makes a request. More important, however, the dissent's argument confuses the statutory concept of "public disclosure" with the different concept of "public accessibility." Information may be publicly disclosed--for example, it may appear buried in an

Second, this disclosure occurred within one or more of the contexts specified in 31 U.S.C. § 3730(e)(4)(A). To begin, we believe that HUD's response constituted an "administrative ... report." *Id.* In *Dunleavy*, 123 F.3d at 745, we concluded that the term " 'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." HUD's response to the FOIA request originated with a department of the federal government and constituted official federal government action, and therefore this response plainly satisfied Dunleavy 's definition of "administrative."

The response also fell within the ordinary meaning of the term "report." A "report" is defined as, among other things, "something that gives information" or a "notification," Webster's Third New International Dictionary 1925 (1971), and an "official or formal statement of facts or proceeding." Black's Law Dictionary 1300 (6th ed.1990). A response to a FOIA request falls within these definitions. Such a response provides information and notification regarding the results of the agency's search for the requested documents and constitutes an official and formal statement concerning those results.

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exhibit that is filed in court without fanfare in an obscure case--and yet not be readily accessible to the general public. And information may be easily accessible to the public--it may be available under FOIA to anyone who simply files a request--but unless there is a request and the information is actually produced, it is not publicly disclosed. *Dunleavy*, 123 F.3d at 746.

Although Mistick ridicules the argument that a response to a FOIA request is an "administrative report," see Reply Br. at 6-7, it is telling that Mistick does not offer a definition of this term.[4] We thus hold that HUD's response to the Priselac FOIA request was an "administrative ... report" and that the documents that HUD provided were publicly disclosed "in" that "report."[5]

We also believe that this response occurred "in a[n] ... administrative ... investigation." 31 U.S.C.

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[4] The dissent argues that a FOIA response is not a report, but the dissent--which elsewhere adheres strictly to the dictionary definition of the statutory phrase "based upon" (see Dissent at 32)--does not come to grips with the fact that a FOIA response falls easily within accepted definitions of the term "report." The dissent seems to have in mind a particular type of government report, with "analysis," a "summary," and/or a "conclusion," see id. at 29, but the ordinary understanding of the term "report" is broader.

[5] FN5. This holding is entirely consistent with our holding in *Dunleavy* that a report prepared at the behest of a county was not itself an "administrative report" because it did not "originate with the federal government." 123 F.3d at 744-46. In *Dunleavy*, the report was not produced under the FOIA. Here, we do not hold that the documents at issue would have fallen within § 3730(e)(4)(A) had they not been produced pursuant to the FOIA. Rather, we hold that HUD's FOIA response was an "administrative report" and the documents were publicly disclosed "in" that report, just as if they had been reproduced as an appendix to a printed report.

§ 3730(e)(4)(A). For the reasons already explained, HUD's search for the documents sought under the FOIA and its decision to disclose them clearly satisfied our court's interpretation of the term "administrative," and we believe that these processes should be viewed as constituting an "investigation" within the meaning of 31 U.S.C. § 3730(e)(4)(A). Accepted definitions of the term "investigation" include "a detailed examination," *Webster's Third New International Dictionary* 1189 (1971), and the "making of a search." 1 *The Compact Edition of the Oxford English Dictionary* 457 (1971). When an agency receives a FOIA request, it is obligated to conduct a search that is reasonably calculated to uncover all relevant documents.[6] *See also, e.g., Miller v. United States Department of State*, 779 F.2d 1378, 1383 (8th Cir.1985); *Weisberg v. United States Department of Justice*, 705 F.2d 1344, 1351 (D.C.Cir.1983). Such a search falls within the common understanding of the term "investigation."[7] *See also* 5 U.S.C. § 552(a)(3)(D) ("For purposes of this

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[6] As with the term "report" (see footnote 4, supra ), the dissent insists on an interpretation of the term "investigation" that is narrower than its meaning in ordinary usage. According to the dissent, the term "investigation" seems to be limited to a criminal investigation or a like investigation of "wrongdoing." Dissent at 29. But in ordinary usage, the term is used more broadly.

[7] Because we hold that the disclosure at issue occurred in an "administrative ... report" and an "administrative ... investigation," we need not and do not reach the defendants' argument that the disclosure also occurred in an "administrative ... hearing."

paragraph, the term 'search' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.")

Most of the decisions of other courts support our holding that the disclosure of documents under the FOIA triggers the jurisdictional bar of 31 U.S.C. § 3730(e)(4)(A). In *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir.1995), vacated on other grounds, 520 U.S. 939 (1997), the Ninth Circuit stated that documents actually produced in response to FOIA requests are publicly disclosed for purposes of the qui tam statute. *See also United States ex rel. Lamers v. City of Green Bay*, 998 F.Supp. 971, 979 (E.D.Wis.1998), *aff'd*, 168 F.3d 1038 (7th Cir.1999); *United States of America ex rel. Burns v. A.D. Roe Co., Inc.*, 919 F.Supp. 255, 257 (W.D.Ky.1996); *United States ex rel. Herbert v. National Academy of Sciences*, 1992 WL 247587, at *6 (D.D.C. Sept.15, 1992) ("Just as civil discovery is public, it must be the case that information obtained pursuant to an FOIA request has been made public through the administrative process and cannot form the basis of a qui tam action. If that were not the case then, like court records, public agency records would be flooded with citizens requesting information in order to bring qui tam suits. Congress did not intend the qui tam provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow."). *But see United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, 1996 WL 11299, at *9 (S.D.N.Y. Jan.4, 1996)

B. **The Mistick State Court Action.** Mistick argues that even if HUD's FOIA response was a covered disclosure under 31 U.S.C. § 3730(e)(4)(A), its qui tam

action was still not jurisdictionally barred. We have held that the public disclosure of a "transaction[ ]" within that provision requires the disclosure of "the elements of the underlying fraudulent transaction." *Dunleavy*, 123 F.3d at 740. This means that the disclosure must reveal both the misrepresented state of facts and the true state of facts so that the inference of fraud may be drawn. *Id.* at 741. Mistick acknowledges that "[t]he misrepresented facts ... were discovered by Mistick in October 1993, pursuant to the Priselac [FOIA] Request." Appellant's Br. at 31. Thus, our holding that this disclosure falls within the coverage of 31 U.S.C. § 3730(e)(4)(A) requires Mistick to fall back on the argument that the jurisdictional bar is not triggered "because the other essential element, the true state of facts, was not publicly disclosed within the meaning of that provision." Id. at 33.

We reject Mistick's fall-back argument because "the true state of facts" was disclosed in civil discovery in the Mistick state court action, and we held in *Stinson*, 944 F.2d at 1160, that civil discovery constitutes "a public disclosure ... in a civil hearing" within the meaning of 31 U.S.C. § 3730(e)(4)(A). According to Mistick, the true facts were (1) that the Glidden policy of not recommending Glid-Wall as a lead-based encapsulant was in effect before Astorino submitted the specifications and (2) that Astorino and the Authority were aware of the policy but knowingly represented otherwise to HUD. As previously noted, both Dennis and Louis Astorino acknowledged these facts in their depositions, and Mistick concedes that all of these facts were revealed in civil discovery in the state court action. At oral argument, the following exchange occurred:

> THE COURT: ... [D]o I understand your answer to be that all of the essential elements were publicly disclosed in the civil litigation but you knew all of those essential elements previously from other sources, including the FOIA request?
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> MR. BEARD: That is correct.

Oral Arg. Tr. at 10.

Mistick contends, however, that although all of the essential elements were revealed in either the FOIA response or in civil discovery, its qui tam action was not "based on" those public disclosures. This argument requires us to consider conflicting decisions from several other circuits regarding the meaning of the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A).

In *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994), the Fourth Circuit held that "based upon" means actually derived from.
The court explained:

> Section 3730(e)(4)(A)'s use of the phrase "based upon" is, we believe, susceptible of a straightforward textual exegesis. To "base upon" means to "use as a basis for." *Webster's Third New International Dictionary* 180 (1986) (definition no. 2 of verb "base"). Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based. Such an

> understanding of the term "based upon," apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing "parasitic" actions *see, e.g.*, Stinson, supra, at 1154, for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

*Id.*

All of the other circuits that have reached this question have disagreed with the Fourth Circuit and have held that "based upon" means "supported by" or "substantially similar to," so that the relator's independent knowledge of the information is irrelevant. *See United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. Univ.*, 147 F.3d 821, 828 (9th Cir.1998), *cert. denied* -- S. Ct. -- 1999 WL 66673 (U.S. Apr. 19, 1999); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-84 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir.1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir.1992).

In reaching this conclusion, the Tenth Circuit observed that "[a]s a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.'" *Precision Co.*, 971 F.2d at 552. The District of Columbia Circuit, while not expressly embracing the Tenth Circuit's view that "based upon" may mean "supported by"

in common usage, found the statutory language to be ambiguous, and then rejected the Fourth Circuit's approach "because it renders the 'original source' exception to the public disclosure bar largely superfluous." Findley, 105 F.3d at 683. After observing that the False Claims Act "requires that a relator have 'direct and independent' knowledge of the alleged fraud or some of its components, and have voluntarily provided the information to the government, in order to benefit from the 'original source' exception to the jurisdictional bar," the court continued:

> Why, one may ask, assuming the Fourth Circuit test of "based upon" as meaning "derived from," would Congress provide an exception in the case of a relator who has actually derived his complaint from public information, that allows him to demonstrate that he already provided his independently obtained knowledge to the government before he filed suit? ... [U]nder the Fourth Circuit's interpretation, the primary "based upon" test swallows the original source exception whole. Using "based upon" as a proxy for whether the relator's complaint merely parrots what is already in the public domain, on the other hand, leads logically to a subsidiary inquiry into whether the relator had obtained the information in his complaint independently prior to the disclosure and so is an "original source."

*Id.*

We see merit in both the Fourth and District of Columbia Circuits' arguments. We agree with the Fourth Circuit that in ordinary usage the phrase "based upon" is not generally used to mean "supported by." On the other

hand, we agree with the District of Columbia Circuit that the Fourth Circuit's interpretation is suspect because it would render the "original source" exception largely superfluous. The dissent strives to show that the Fourth Circuit's interpretation might not render the original source exception entirely superfluous, but we are not persuaded.

The dissent first argues that it may be possible for the allegations or transactions set forth in an individual's claim to be derived from a public disclosure, *see* 31 U.S.C. § 3730(e)(4)(A), and yet for that individual to have had direct and independent prior knowledge of "the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). The dissent writes that "a relator who is barred because he has derived some of his fraud information from a public disclosure may still bring the claim as an original source if he has direct and independent knowledge of some other essential element of the claim." Dissenting Op. at 39-40. However, the dissent makes no effort to explain how this interpretation can be made to fit the language of 31 U.S.C. §§ 3730(e)(4)(A) and 31 U.S.C. § 3730(e)(4)(B) (the "original source" exception). Indeed, the dissent does not even commit itself to this interpretation but merely raises it as a possibility. *See* Dissenting Op. at 40. Thus, the dissent relies on the possibility that the apparent superfluity of the "original source" exception (under its interpretation of "based upon") may be avoided pursuant to a scheme of interpretation that it declines to explicate or embrace. We find this unconvincing.

The dissent's second argument, as we understand it, is that, even if its interpretation of "based upon" makes the "original source" exception substantively superfluous, Congress might have adopted that exception in order to

provide a different procedural avenue for a qui tam relator to use in showing that his action was not derived from a public disclosure. The dissent writes that "it may be easier for the relator to establish himself as an 'original source' of the information than to successfully disprove a caused link between the public disclosures and his qui tam claim." Dissent at 40. However, even if there were no "original source" exception as such, an individual could still prove that his information was not derived from a public disclosure by showing that he was an original source of the information. Thus, this argument fails to explain why Congress would have adopted the "original source" exception if the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A) meant "derived from." As a result, we agree with the District of Columbia Circuit that the Fourth Circuit's interpretation of "based upon" makes the "original source" exception largely superfluous.

We are thus confronted with a clash between two textual arguments concerning the meaning of 31 U.S.C. § 3730(e)(4)(A): one based on the ordinary meaning of the phrase "based upon" and one based on the precept that a statute should be construed if possible so as not to render any of its terms superfluous. *See, e.g ., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *First Bank Nat'l Ass'n v. FDIC*, 79 F.3d 362, 367 (3d Cir.1996); *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 42 (3d Cir.1993), *cert. denied*, 510 U.S. 1114 (1994). In the end, we are persuaded to follow the majority approach.

Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language. To begin with a

small example, this section refers to the General Accounting Office as the "Government Accounting Office" and thus misnames an instrumentality that Congress has consistently viewed as its own. *See Bowsher v. Synar*, 478 U.S. 714, 731 (1986). The section refers awkwardly to "the public disclosure ... from the news media." *Id.* (emphasis added). The section refers to criminal and civil "hearing[s]," when it surely means, not just those proceedings that are generally labeled "hearings," but also full-blown criminal and civil trials, and other court proceedings that are not described as "hearings" in standard usage. *See Stinson*, 944 F.2d at 1154-58. The section refers to jurisdiction over "an action" that is based on a public disclosure, and thus the drafters seem to have overlooked the elementary point that a qui tam "action" may contain multiple claims, only some of which may be "based upon" a public disclosure, however that phrase is defined. In addition, whether the phrase "based upon" means "derived from" or "supported by," a careful drafter would have realized the need to specify *the degree* to which the "action" must be "based upon" the public disclosure in order to fall within the jurisdictional bar.[8] Section 3730(e)(4)(A) refers to the disclosure of "allegations or transactions," but § 3730(e)(4)(B), in referring to independent knowledge "of the information on which the allegations are based," inexplicably fails to mention "transactions." (Are "transactions" irrelevant under this latter provision? Are they subsumed within the concept of "allegations"?) The inescapable conclusion is that the qui tam provision does not reflect careful drafting.

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[8] We were required to decide this point in *Dunleavy*, 123 F.3d at 746.

In light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A). We find Section 3730(e)(4)(A) to be syntactically ambiguous because we are uncertain that the drafters of that provision focused on the difference in precise usage between, on the one hand, a suit based upon a public disclosure of an allegation or transaction and, on the other, a suit based upon an allegation or transaction and that has been publicly disclosed.[9] Under these circumstances, we think that it is

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[9] Although we do not rely on the legislative history of the qui tam provision in reaching this conclusion, *see Stinson*, 944 F.2d at 1154, it is interesting that sponsors of the 1986 False Claim Act Amendments described it as having a meaning consistent with our holding. Senator Grassley, one of original Senate sponsors, in speaking of the technical and clarifying amendments that introduced the present language in § 3730(e)(4)(A), stated:

> [J]urisdiction for qui tam actions based on information *that has been publicly disclosed* will be limited to those people who were "original sources" of the information....

132 Cong. Rec. S11238-04 (Aug. 11, 1986) (emphasis added). Similarly, Representative Berman, one of the sponsors of the House bill, submitted "legislative history" that stated in relevant part:

> Before the relevant information regarding fraud is publicly disclosed through various government hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action

best to follow the majority interpretation, which is much more consistent with the rest of the qui tam provision. We thus hold that a qui tam action is "based upon" a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims. Because the latter condition is satisfied here, the qui tam action at issue was "based upon" qualifying disclosures and is consequently subject to the jurisdictional bar of § 3730(e)(4)(A) unless it is saved by the "original source" exception, to which we next turn.

C. *"Original source" exception.* Section 3730(e)(4)(A)'s jurisdictional bar does not apply if "the person bringing the action is an original source of the information." Section 3730(e)(4)(B) (emphasis added) defines an "original source" as

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

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> as long as it is filed before the government filed an action based upon the same information. *Once, the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action.*

132 Cong. Rec. H9382-03 (Oct. 7, 1986) (emphasis added).

Here, Mistick is not an "original source" because it did not have "direct and independent knowledge" of the most critical element of its claims, *viz.*, that the Authority had made the alleged misrepresentations to HUD regarding its knowledge about Glid-Wall's unsuitability as a lead-based paint encapsulant at the time of the original specifications. "[A] relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of original source.' " *Stinson*, 944 F.2d at 1160. As previously noted, Mistick acknowledges that "[t]he misrepresented facts were discovered by Mistick in October 1993, pursuant to the Priselac FOIA Request." Appellant's Br. at 31. Since HUD's FOIA response was a qualifying public disclosure under § 3730(e)(4)(A), Mistick was not an original source of that information. While "it is not necessary for a relator to have all the relevant information in order to qualify as 'independent,' " *Stinson*, 944 F.2d at 1160, a relator cannot be said to have "direct and independent knowledge of the information on which [its fraud] allegations are based," 31 U.S.C. § 3730(e)(4)(B), if the relator has no direct and independent knowledge of the allegedly fraudulent statements. Thus, Mistick's "original source" argument fails.

III.

In summary, we hold that Mistick's qui tam action was barred by 31 U.S.C. § 3730(e)(4)(A) because it was "based upon the public disclosure" of the relevant transactions in an "administrative ... report" and "investigation" (HUD's search for the documents sought in the FOIA request and its response to that request) and in a

"civil ... hearing" (discovery in Mistick's state-court action) and because Mistick does not qualify as an "original source."[10] We therefore affirm the decision of the District Court.

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[10] In light of our disposition of these issues, we find it unnecessary to address the other grounds for affirmance that the defendants have advanced.

BECKER, *Chief Judge*, dissenting:

Judge Alito's majority opinion cuts through this enormously complicated area of the law in a candid and straightforward manner. While the result it reaches is not unreasonable, it is, I respectfully submit, incorrect. On the critical "based upon" issue, Judge Alito follows the majority view of other circuits. As I will explain, I would follow the minority view, primarily because it alone is faithful to the plain language of the governing statute. More particularly, I do not believe that the phrase "based upon," especially in the context in which it is found in the False Claims Act ("FCA"), can properly be read to mean, as the majority here concludes, "supported by." Rather, it means "derived from" or "used as a basis for." I take issue with the majority's contention that we may avoid this plain reading of "based upon" because Congress was sloppy in its drafting of the jurisdictional bar. I also follow the minority view because I believe that it better reflects the policy that Congress had in mind in its most recent amendments to the FCA. Finally, I believe that the present majority is incorrect in asserting that a plain reading of "based upon" would render the "original source" exception superfluous.

On the "public disclosure" issue, the majority feels bound by our prior caselaw, particularly *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir.1991). While we are constrained to follow our binding precedent, I disagree with the majority's broad reading of *Stinson*, which arose in a very different context--civil litigation--than that involved here. More specifically, I believe that materials obtained through a FOIA request do not

constitute a "public disclosure" under the FCA, even given our holding in *Stinson*, because a government agency's act of locating and duplicating records for a single FOIA requester is fundamentally different from the disclosure of discovery material in civil litigation, which includes a "presumption ... of public access." *Stinson*, 944 F.2d at 1159.

These readings of the statute compel the conclusion that the jurisdictional bar does not apply in this case. First, if, as I believe, the FOIA material does not constitute a public disclosure, Mistick would not be barred from bringing its qui tam action, given our prior caselaw. Second, under my interpretation of "based upon," Mistick's qui tam action would not be barred if it obtained the information underlying its claim from a source other than a public disclosure. It has so alleged, and this may in fact be the case. Therefore, even if the FOIA material is deemed a public disclosure, I would still reverse the District Court's decision dismissing Mistick's qui tam claim and remand for a determination by that court whether the claim is "based upon," i.e., derived from, information in any public disclosures. Because I would reverse the District Court's determination that Mistick's claim is "based upon" public disclosures, I would not reach the question whether Mistick is an original source of the information in any public disclosures.

So that it is fresh in our minds as we weave our way through this statutory maze, I rescribe the relevant jurisdictional bar:

> No court shall have jurisdiction over an action under this section based upon the public disclosure

> of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (1994). As it will make for a more orderly discussion, I will first address the public disclosure issue. In the course of that discussion, the tenor of which is adumbrated above, I will explain why I believe Stinson to have been wrongly decided and hence a candidate, at some point in time, for en banc consideration.

## I. Public Disclosures

The majority concludes that both the information in the state-court discovery and the product of Mistick's FOIA request constituted public disclosures. I am constrained to agree with the first of these holdings, as this was the precise issue decided in *Stinson*. However, I dissent from the second, as I do not believe that *Stinson*--even if it were correctly decided--inexorably leads to the conclusion that information obtained through a FOIA request by a single individual is necessarily a "public disclosure." Explication of my position on the FOIA issue will be informed by explaining at the outset my problems with *Stinson 's* definition of public disclosure, under which discovery material given to a single p rson in litigation between two private parties, and not even filed with a court, constitutes a "public disclosure."

In *Stinson*, the panel majority reasoned that "section 3730(e)(4) [is] designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *Stinson*, 944 F.2d at 1155-56. It specifically held that "[i]nformation gleaned in litigation and on file in the clerk's office falls in this category," even if the information is actually known only to the small group of private litigants involved in the action in which the information was presented through discovery. *Id.* at 1156; *see also id.* at 1158 ("[D]isclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the FCA.").

The holding in *Stinson* was based in part on the fact that "the Local Rules of some district courts provide that the court may order the filing of discovery materials at the request of any person who has an interest in reviewing the materials." *Id.* at 1158-59. Although the panel may have been technically correct, this statement obscures the actual situation in most federal courts. In this circuit, *every* U.S. district court proscribes by local rule the filing of discovery material.[11] The assumption that the right to seek access to such unfiled materials by requesting their filing, see infra note 2, will be availed of in any but a handful of cases seems blithe. First, the procedure is costly and cumbersome. Second, individuals unconnected with the

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[11] See D. Del. R. Civ. P. 5.4(a) (providing that discovery materials "shall not be filed with the Court"); D.N.J. R. Civ. P. 26.1(c)(1) (same); E.D. Pa. R. Civ. P. 26.1(a) (same); M.D. Pa. R. Civ. P. 5.4(b) (same); W.D. Pa. R. Civ. P. 5.3(A) (same).

litigation, other than the media, will generally not know of it or will be unmotivated to bear the cost and burden of pursuing the filing of such material.

More importantly, *Stinson's* definition appears to me to encompass a much broader category of "disclosures" than what Congress intended to include within that term. *Cf. United States v. Bank of Farmington*, 166 F.3d 853, 861-62 (7th Cir.1999) ("[W]e reject the construction ... according to which there is public disclosure if the allegations are disclosed to any single member of the public not previously informed thereof." (internal quotations and brackets omitted)); *Stinson*, 944 F.2d at 1169 (Scirica, J., dissenting) ("I do not believe Congress intended to bar relators who obtain non-public information simply because that information might become public at a later time.").

Congress's primary intent in enacting the 1986 FCA amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 99-345, at 1 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5266. As for the qui tam provisions of the FCA amendments, Congress's "overall intent" was "to encourage more private enforcement suits." *Id.* at 23-24, *reprinted* in 1986 U.S.C.C.A.N. at 5288-89. While avoiding parasitic lawsuits was clearly an additional goal, there is no indication that Congress sought to preclude the disclosure and prosecution of fraud when a prior, purely technical disclosure had been made. Rather, like Judge Scirica, "I can discern no reason why Congress would be concerned about information that has not yet been disclosed to the general public." *Stinson*, 944 F.2d at 1170 (Scirica, J., dissenting).

By precluding suits "based upon the public disclosure of allegations or transactions in" specific judicial, legislative, or administrative sources, or through the news media, Congress sought to ensure that no qui tam relator could profit from information that had become part of the public domain. Interpreting "public disclosure" to encompass information passed from one private litigant to another in the context of some obscure litigation may simplify our task of weeding out legitimate qui tam cases from parasitic ones (by effectively avoiding this sometimes difficult factual question), but it fails to serve Congress's primary goals of encouraging disclosure and aiding prosecution of fraud on the government. There is no assurance that information about a fraud on the government, contained in privately disclosed discovery material (which will always constitute a "public disclosure" under *Stinson* ), will either come to the government's attention or will lead to a private qui tam action. I agree with Judge Scirica's observation that "Congress drew the line at the point of actual public disclosure because it felt that this rule would bring the most fraud to light without engendering unnecessary suits." *Id.* at 1171 (Scirica, J., dissenting).

Although I think Stinson 's reading of "public disclosure" is likely too broad and should be reconsidered by this court en banc, I also believe that materials obtained through a FOIA request are easily distinguishable from the discovery material deemed a public disclosure in Stinson. In contrast with Stinson, we recently held that a county government report filed with the federal government is not a public disclosure. *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 745-46 (3d Cir.1997). Distinguishing our holding in *Stinson*, we noted the danger

of extending "*Stinson 's* 'potential availability' standard ... to the context" of administrative reports. *Id.* at 746 n. 14. I think that the reasoning behind *Stinson* and our decision in *Dunleavy* lead to the conclusion that the FOIA material at issue here is not a public disclosure.

First, it is clear that under *Dunleavy*, the simple fact that information subject to a FOIA request is potentially available to interested parties is insufficient to render it a "public disclosure." If this were the case, the information in *Dunleavy*, which the defendant had provided to a federal government agency, would have constituted a "public disclosure." More importantly, there is a clear distinction between discovery materials, which carry a "presumption ... of public access," and the information contained in a FOIA request, which is provided to a single requester who *is under no obligation to disclose this material to any other members of the public.* This distinction can be seen by comparing the rules governing discovery with the statutory and regulatory provisions governing Mistick's FOIA request.

Local court rules often provide that while discovery material should not be filed with the court, *see supra* note 1, such material may under certain circumstances be filed. In this circuit, each U.S. district court also has rules governing filing and access to discovery materials.[12] In

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[12] *See* D. Del. R. Civ. P. 5.4(c)-(e) (providing for filing when necessary for use before, during, or after trial, or on motion of the court or any party, or "on application by a non-party"); D.N.J. R. Civ. P. 26.1(c)(1) (providing for filing of discovery materials "when needed in a particular pretrial proceeding or upon order of the Court");

*Stinson*, the qui tam claimant argued that discovery material was not a "public disclosure" precisely because it need not be filed with the court. *See Stinson*, 944 F.2d at 1158. As noted above, however, the panel rejected this argument, responding:

> We do not think that it is significant, for purposes of interpreting the "public disclosure" provision of the FCA, whether the discovery has in fact been filed. Due to the large volume of discovery materials, many district courts have adopted local rules which provide that discovery materials should not be filed with the court except by order of the court. *Such local rules do not generally preclude access by interested persons to nonfiled material.* In fact, the Local Rules of some district courts provide that *the court may order the filing of discovery materials* at the request of any person who has an interest in reviewing the materials.

*Id.* at 1158-59 (emphasis added) (footnote omitted). The panel reiterated this point in its conclusion: "To recapitulate, the presumption under Rule 5(d) of public access to civil discovery that is not subject to a protective order leads us to conclude that information received as a

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E.D. Pa. R. Civ. P. 26.1(e) (providing for filing of discovery materials on motion of the court or of any party, "or on application by a non-party"); M.D. Pa. R. Civ. P. 5.4(c)(e) (providing for filing of materials under certain circumstances); W.D. Pa. R. Civ. P. 5.3(E) (providing for filing of discovery materials "in the usual course in any case where any person shall file an affidavit with the clerk that he has a genuine interest in reading the material").

result of such discovery should be deemed based on a 'public disclosure' for purposes of the FCA jurisdictional bar." *Id.* at 1159-60.

While I have taken issue with the conclusion that the *Stinson* majority drew from this potential availability of discovery materials, *see supra* at 24-25, it is clear that such material is far more publicly accessible than is the material obtained under a FOIA request. FOIA expressly provides that records furnished in response to a FOIA request are to be made "available for public inspection and copying" *only* when the relevant agency determines that, "because of the nature of their subject matter, ... [the records] have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D) (1994 & Supp. II 1996). Otherwise, such records are provided only to the individual FOIA requester. Further, nothing in FOIA would require the FOIA recipient to share the fruits of his request with other members of the public.

Although § 552(a)(2)(D) was added in 1996,[13] after Mistick made its FOIA request, nothing in FOIA at the time of Mistick's request would have required HUD (or Mistick) to make the materials provided through the request available to other members of the public. Additionally, in enacting the 1996 amendment, Congress did not intend to make most materials disclosed through a FOIA request presumptively accessible to the general public, but was only ensuring broad access to "previously-

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[13] *See* Electronic Freedom of Information Act Amendments of 1996, Pub.L. No. 104-231, § 4(5), 110 Stat. 3048, 3049.

released records on a popular topic, such as the assassinations of public figures." H.R.Rep. No. 104-795, at 21 (1996), *reprinted* in 1996 U.S.C.C.A.N. 3448, 3464. In fact, since enactment of § 552(a)(2)(D), HUD has not amended its own regulations governing FOIA requests, as it apparently does not anticipate fulfilling very many FOIA requests that are likely to become the subject of subsequent, substantially similar requests. *See* 24 C.F.R. § 15.12(a)(1)-(3) (1998) (providing that HUD will make available for public inspection and copying three of the four categories of material included in 5 U.S.C. § 552(a)(2), failing to include material listed in § 552(a)(2)(D)).

Therefore, unlike most discovery material, no member of the public has a right of access to information that another person obtained through a FOIA request -- nor can anyone seek an order compelling a FOIA recipient himself to "publicly disclose" material obtained through his FOIA request. Of course, other members of the public may themselves file a FOIA request seeking the same information, but this does not depend on, nor change the nature of, the material released through the prior FOIA request by a single citizen. And of course the information remains in the government's files, but under *Dunleavy*, this is insufficient to turn these records into a "public disclosure." *See Dunleavy*, 123 F.3d at 746.

In *Dunleavy*, we held that the list of enumerated sources in § 3730(e)(4)(A) "constitutes an exhaustive rendition of the possible sources" of a public disclosure. *Id.* at 744. The only enumerated sources that could be apposite here are an "administrative ... report" or an "administrative ... investigation." The majority concludes

that an agency's act of fulfilling a FOIA request satisfies this source requirement, as both an administrative report and an administrative investigation. I think that this conclusion also is incorrect. FOIA requires federal agencies to search their records "for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D) (1994 & Supp. II 1996). It does not compel an agency to "investigate" a request, in the sense that an agency of the federal government normally investigates such things as allegations of fraud, crimes, or other wrongdoing. Rather, the Act simply forces agencies to "make [their] records promptly available," upon request. *Id.* § 552(a)(3)(A); *see also* 24 C.F.R. § 15.14(g)(2) (1998) (under HUD regulation governing costs of FOIA requests, "search" is defined as "time spent looking for material that is responsive to a request"). The Act is essentially a mechanism for duplicating records that are in the possession of the federal government and that are not otherwise excludable from members of the public. Thus, there is no "administrative ... investigation."

Further, the duplication can hardly be described as an "administrative ... report." There is no analysis, summary, conclusion, or other content to "report" to the FOIA requester. Rather, the actual records themselves, with possible redactions, are merely duplicated and provided to the FOIA requester. *See*5 U.S.C. S 552(a)(4)(A) (1994); *see also* 24 C.F.R. § 15.14(a) (1998) (listing fees for HUD's fulfilling of FOIA requests through the "reproduction or duplication of documents"). Again, I believe that the majority strains to read the phrases "investigation" and "report" to encompass a government agency's rudimentary act of locating and duplicating requested records. Under

this analysis, the methodological requirements for establishing the jurisdictional bar are not met.

We held in *Dunleavy* that public disclosures bar a qui tam action only if the disclosures include *both* the misrepresented state of facts and the true state of facts. *See Dunleavy*, 123 F.3d at 741. The majority concludes that the misrepresented state of facts (i.e., that the defendants did not know of the problem with Glid Wall until 1990) was disclosed in the FOIA material and that the true state of facts (i.e., that the defendants knew of the Glid Wall problem as early as 1987) was revealed in the state-court action, meeting the requirements for a public disclosure. Although I am constrained to agree with the majority's conclusion that (under our holding in *Stinson* ) the discovery material in this case constitutes a public disclosure, because I would find that the FOIA material--the source of the *misrepresented* facts--is not a public disclosure, I would hold that Mistick's claim is not jurisdictionally barred.

II. "Based Upon"

Although my view of the FOIA materials would, in and of itself, require reversal of the District Court's dismissal of Mistick's claim, I address the "based upon" issue, as it is a critical issue, and one on which I believe the majority has reached a manifestly incorrect conclusion. Courts have differed on the proper interpretation of this phrase. *Compare, e.g., United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-85 (D.C.Cir.) (holding that a qui tam action is based upon public disclosures if it relies on the same allegations or transactions as those in the public disclosure), *cert. denied*,

118 S.Ct. 172 (1997), with *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-49 (4th Cir.1994) (holding that a qui tam action is based upon public disclosures only if it "actually derived [its] allegations" from the public disclosures). So have commentators. ARTICLES FOOTNOTE *Compare* Robert Salcido, *Screening Out Unworthy Whistleblower Actions*, 24 Pub. Cont. L.J. 237, 272-79 (1995) (advocating broad view of "based upon"), *with* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claim Act's Public Disclosure Bar*, 27 Pub. Cont. L.J. 669, 697-705 (1998) (advocating plain reading of "based upon"), *and* Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 Pub. Cont. L.J. 477, 499-501 (1995) (same).

In view of this literature, I will not describe the debate at length here. I will, however, explain why I find more persuasive the view that a qui tam plaintiff is barred from bringing his claim only when he has *derived* his information regarding the allegations or transactions underlying his cause of action from public disclosures.

A. *The Contending Views of "Based Upon"*

The first court of appeals to adopt a plain reading of "based upon" was the Fourth Circuit, in an opinion by Judge Luttig. The court noted that the "reading of 'based upon' as meaning 'derived from' is the only fair construction of the statutory phrase." *Siller*, 21 F.3d at 1348. It therefore held that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Id.*

The court also noted that its reading was not only the most logical reading of the statute's plain text, but also effectuated Congress's goal of precluding "parasitic" suits by non-whistleblowers attempting to take advantage of public disclosures: "[I]t is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but [that] were not actually derived from those public disclosures, simply is not, in any sense, parasitic." *Id.*

The contrasting view is explicated in Judge Wald's decision for the D.C. Circuit in *Findley*. In addition to claiming that the Fourth Circuit's interpretation of "based upon" rendered the "original source" exception superfluous, the court in *Findley* considered the legislative history of the FCA. *See Findley*, 105 F.3d at 683-84. It expressed its belief that Congress, in the 1986 amendments, "changed the focus of the jurisdictional bar from evidence of fraud inside the government's overcrowded file cabinets to fraud already exposed in the public domain." *Id.* at 684.

The majority today agrees with *Findley 's* reading of "based upon" and rejects *Siller 's* plain reading of the jurisdictional bar. It cites two justifications for doing so: (1) because Congress was sloppy in choosing the language of the jurisdictional bar, we should not give this text its plain meaning, and (2) the plain reading of "based upon" renders the "original source" exception superfluous. *See* Maj. Op. at 15-16. I take up each of these contentions below, after a discussion of the Act's plain meaning. I conclude by considering whether the plain reading of the text adequately fulfills Congress's goals in the 1986 amendments.

B. *The Plain Meaning of "Based Upon"*

The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result. *See, e.g., Darby v. Cisneros*, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of [a provision of the APA] is unnecessary in light of the plain meaning of the statutory text."); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) ("The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical."); *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) ("We begin by looking to the language of the Act.... When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." (internal quotations omitted)). The Court has instructed us to begin with a statute's text when discerning its meaning, and to "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James*, 478 U.S. 597, 604 (1986) (internal quotation omitted).

As the Fourth Circuit said in *Siller*, "Section 3730(e)(4)(A)'s use of the phrase 'based upon' is ... susceptible of a straightforward textual exegesis. To 'base upon' means to 'use as a basis for.' " 21 F.3d at 1348 (quoting *Webster's Third New International Dictionary* 180 (1986)). I agree with this plain reading of the phrase "based upon" and further concur with *Siller 's* conclusion that there is no usage, "let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.' " *Id.* at 1349.

Other federal statutes and case law support my plain reading of the phrase "based upon." For example, an exception to the Foreign Sovereign Immunities Act of 1976 allows a plaintiff to bring suit against a foreign government in any case "in which the action is based upon a commercial activity carried on ... by the foreign state." 28 U.S.C. S 1605(a)(2) (1994). In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the plaintiff had allegedly been tortured and beaten by Saudi Arabian law enforcement officers in retaliation for his complaints about safety problems at a Saudi hospital at which he worked. *See id.* at 352-53. He brought an action against the Saudi government, contending that his claim was "based upon a commercial activity" of that government because he was recruited to work at its hospital, signed an employment contract with the government to work at the hospital, and was actually employed by the government to work there.

In determining whether the action was "based upon a commercial activity," the Supreme Court first noted:

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.

*Id.* at 357 (citing *Black's Law Dictionary, Random House Dictionary*, and *Webster's Third New International Dictionary* ). The Court then held that, "where a claim

rests entirely upon activities sovereign in character, ... jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity." *Id.* at 358 n. 4. Because the recruitment, contract signing, and employment at the hospital, all admittedly commercial in character, "[were] not the basis for the Nelsons' suit," the action was not based upon a commercial activity of the foreign government. > *Id.* at 358; *see also id.* at 364 (White, J., concurring in judgment) (agreeing with the majority that the recruiting and hiring of the plaintiff was " 'not the basis for the Nelsons' suit,' for it is unrelated to the elements of [their] complaint" (citation omitted)).

The commercial activities may have provided the background for the complaint and have had a "connection" to the sovereign acts that the claim was based upon, but the action was not derived from these commercial activities; rather, the action was derived from the tortious acts of foreign government officials. Therefore, it was not "based upon" commercial activities of the foreign government.

Similarly, in the FCA context, I believe that "guidance is hardly necessary." While public disclosures will typically have some connection to the allegations in a relator's complaint, in the sense that the disclosures and the allegations in the complaint are similar, the latter cannot be said to be "based upon" the former when the complaint "rests upon" allegations contained in some other (nonpublicly disclosed) source.

Judicial use of the words "based upon" also supports my reading of this simple phrase. For example, in the context of the "independent source" exception to the

exclusionary rule, evidence is not excluded if it is derived from some source other than the tainted search or identification. The Supreme Court has described the government's burden in such a situation as proving that evidence introduced at trial was "based upon" some source other than the illegal one, or that "the evidence to which instant objection is made has [not] been come at by exploitation of that illegality [but] instead by means sufficiently distinguishable to be purged of the primary taint." *United States v. Wade*, 388 U.S. 218, 241 (1967) (internal quotation omitted). The Court's use of the phrase "based upon" in *Wade*, to mean "come at by exploitation of," is consistent with my plain reading of "based upon" in the FCA. If a qui tam action exists only by exploitation of publicly disclosed allegations or transactions, it falls within the jurisdictional bar. If, on the other hand, knowledge of the allegations or transactions at the heart of a qui tam claim was obtained through "means sufficiently distinguishable to be purged of the primary taint" of the public disclosures, the bar should not apply.[14]

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[14] My plain reading of "based upon" finds support in still other fields. For example, under copyright law, a "derivative" work is defined as one that is "based upon one or more preexisting works," 17 U.S.C. § 101 (1994), a definition that has been read as requiring that the derivative work be "substantially copied from a prior work." 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.01, at 3-3 (1997) (emphasis omitted). In other words, if the latter work is similar to the preexisting one, but is not copied substantially therefrom, it is not "based upon" that preexisting work.

In the present case, the majority finds that a qui tam action that relies on information that is similar to that which has been publicly disclosed is ineluctably "based upon" the public disclosures, even though the qui tam relator has not "come at [this information] by exploitation of" the public disclosures, or "substantially copied" its information from the public disclosures. I find that this reading flies in the face of the plain meaning of "based upon," as indicated by its usage in common parlance, in other statutes, and in judicial opinions. It is noteworthy that the majority does not take issue with this plain meaning discussion. Indeed, it implicitly concedes its efficacy, though not its overwhelming force. I now turn to the majority's efforts to blunt the pellucid text of the FCA by reference to Congress's sloppy drafting and the alleged undermining of the "original source" exception by this plain reading of the statute. I then examine the purpose and policy undergirding the qui tam statute, which inform the varying interpretations of "based upon." But on the basis of the plain meaning alone, I would find that the jurisdictional bar does not apply to a qui tam claim that is not derived from public disclosures.

### C. *Congress's Sloppy Drafting*

The majority claims that we may ignore the plain meaning of § 3730(e)(4)(A) because it "does not reflect careful drafting or a precise use of language." Maj. Op. at 18.[15] The majority lists a number of minor drafting

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[15] This is hardly a new phenomenon. Congress regularly lapses into sloppy drafting, as has been frequently noted by courts. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("RICO may be a

problems in support of its argument. For example, it notes the mistaken identification of the General Accounting Office (or "GAO") as the "Government Accounting Office,"[16] the use of the phrase "hearing" when the broader concept of "trial" was clearly intended, and the preclusion of jurisdiction over qui tam "actions," when such actions may contain many "claims," some of which are "based upon" public disclosures and others which are not. The majority's reliance on Congress's alleged sloppiness appears to be a different way of saying that "the language of the statute is ambiguous," thereby giving us license to "consider the structure and context of the ambiguous language," *Findley*, 105 F.3d at 683, rather than giving it its plain meaning.

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poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court."); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir.1993) (noting that CERCLA is "notorious for its lack of clarity and poor draftsmanship"); *Cvikich v. Railroad Retirement Bd.*, 860 F.2d 103, 104 (3d Cir.1988) (giving a provision of the Railroad Retirement Act its plain meaning, despite its "poor draftsmanship"). Yet we interpret these poorly drafted statutes as best we can, and "assume that in drafting legislation, Congress says what it means." *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 809 (10th Cir.1998).

[16] The drafter who made this error was likely confused by the appellations of the Government Printing Office, which publishes government reports, and the General Accounting Office, which performs government audits. I note that both reports and audits of the "Government Accounting Office" are listed as public disclosures in § 3730(e)(4)(A).

I find this argument unpersuasive because, whether or not Congress was sloppy in its choice of certain words, there is nothing ambiguous about the phrase "based upon," and its interpretation requires no "fine parsing of the syntax of § 3730(e)(4)(A)." Maj. Op. at 19. As for the majority's examples of Congress's sloppiness, it certainly was reasonable for Congress to use the general phrase, "criminal, civil, or administrative hearing," if it intended to include under this aegis criminal or civil trials. Its choice of words could easily reflect not imprecise drafting, but an attempt to broadly encompass criminal, civil, or administrative proceedings, without listing every possibility, such as criminal pre-trial hearings, criminal trials, sentencing hearings, civil discovery proceedings, civil trials, appellate hearings, administrative hearings, etc.

The majority gives no indication of the origin of the GAO mistake, and it is possible that it was simply a transcribing problem or a mistake by a single staff person that escaped detection. Courts have frequently referred to the General Accounting Office as the Government Accounting Office, a reasonable mistake on which I believe the majority places more emphasis than it deserves. See, *e.g.*, *Adams v. Hinchman*, 154 F.3d 420, 421 (D.C.Cir.1998) (referring to the "Government Accounting Office" in a Fair Labor Standards Act case brought by federal employees), *cert. denied*, 119 S.Ct. 2046 (1999); *Dunleavy*, 123 F.3d at 745 ("We take notice of the fact that Congress and the Government Accounting Office are entities of our federal government.").

In addition, Congress has previously made the same mistake, and corrected it when its error was discovered.

*Compare* Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub.L. No. 102-233, § 106(d), 105 Stat. 1761, 1764 (adding new subsection (k)(11)(B) to 12 U.S.C. § 1441a, requiring the Resolution Trust Corporation to report to certain congressional committees "[t]he total number of individuals performing services for the Corporation as an employee of ... the Government Accounting Office"), *with* Housing and Community Development Act of 1992, Pub.L. No. 102-550, § 1611(d)(3)(B), 106 Stat. 3672, 4091 (amending § 1441a(k)(11)(B), to replace "Government Accounting Office" with "General Accounting Office").[17] The majority cannot be suggesting that courts should have ignored the plain meaning of the entire Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, simply because of the misidentification of the GAO in one part of that enactment.

Finally, as with its misnaming of the GAO, Congress's use of a broad term such as "action" (or "case") when the more limited "claim" might be more appropriate is far from unprecedented. *See, e.g., Wisconsin Dep't of Corrections v. Schacht*, 118 S.Ct. 2047, 2054 (1998)

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[17] Apparently, the leading newspapers in our nation's capital are also not immune to the problem of misnaming the GAO. A search of the relevant Westlaw databases produced 128 articles from the *Washington Post* over the past fifteen years in which the GAO was mistakenly identified as the "Government Accounting Office," and 48 articles from the *Washington Times* over the past nine years in which the same mistake was made. On the other hand, the papers correctly identified the GAO thousands of times during these periods.

("Conceivably, one might also read [28 U.S.C. § 1447(c)'s] reference to 'case,' to include a claim within a case as well as the entire case."). As noted *supra* note 5, however, our ultimate task is to effectuate Congress's intent, as demonstrated first and foremost by the language it has employed, even if that language is less than precise.

Most importantly, as I discuss *infra* Part II.E, even if the language of the FCA is imprecise or ambiguous, thereby justifying resort to legislative intent, Congress's intent is better effectuated by the narrow reading of "based upon." Suffice it to say here that I find unavailing the majority's attempt to avoid the plain meaning of this phrase on the ground that Congress was being sloppy at the time it codified the relevant statutory provision.

D. *Does a Plain Reading of "Based Upon" Render the "Original Source" Exception Meaningless?*

The majority adopts the view of the D.C. Circuit that the plain reading of "based upon" renders the "original source" exception superfluous, a result we should try to avoid. *See* Maj. Op. at 385-86. In *Findley*, Judge Wald posited an example of a relator who "independently" investigated a fraud after reading about it in the *Washington Post* or *Washington Times* in order to qualify as an original source despite the fact that the hypothetical relator's claim was derived from a public disclosure. *See Findley*, 105 F.3d at 683. It is clear, however, that the present relator, Mistick, is nothing like the opportunistic and parasitic relator conjured up by Judge Wald. Rather, Mistick plausibly alleges (but has not had the opportunity to prove) that it learned of defendants' fraud well *before* it was "publicly disclosed" in state-court litigation (not in a

widely circulated newspaper). Thus, Judge Wald's bellwether example is so extreme as to undermine her position.

Under the plain reading of "based upon," it is true that a relator whose claim is derived entirely from public disclosures cannot be an original source because the entire claim is "dependent" on the public disclosures, and a fortiori the relator does not have "independent" knowledge of any elements of his claim. While it is entirely possible that Congress, in enacting the complex and overlapping amendments to the FCA in 1986, failed to foresee that its new "based upon" language could render the "original source" exception superfluous, this provides scant basis for our failing to give effect to plain congressional language. Ironically, the majority implies that the same Congress whose sloppy drafting it invokes to justify ignoring the FCA's plain meaning would have been careful (or sufficiently astute) to avoid enacting an original source exception that has subtle, and perhaps unintended, interactions with the jurisdictional bar in § 3730(e)(4)(A). But even under the plain reading of "based upon," I believe that there are at least two situations in which the original source exception will assist a relator whose claim is (or appears to be) derived from public disclosures.

First, in *Stinson*, the majority observed that, "[u]ndoubtedly, it is not necessary for a relator to have all the relevant information in order to qualify as 'independent.'" *Stinson*, 944 F.2d at 1160; *see also United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C.Cir.1994) (holding that a relator, to be an original source, need have "direct and independent knowledge of any essential element of the underlying fraud

transaction"). Just as the *Stinson* majority assumed that an original source need not have independent knowledge of all elements of his claim, it is possible that a qui tam claim need not be derived entirely from public disclosures to fall under the "based upon" jurisdictional bar, as long as some essential element of the qui tam claim is derived from public disclosures. A number of courts have so held, though I take no position here on this complex question. *See, e.g.*, *Farmington*, 166 F.3d at 863 (holding that a claim is "based upon" a public disclosure "[i]f the public disclosure from which the information is actually derived is essential to a qui tam claim"); *cf. United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir.1992) (holding that "an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless 'based upon' such allegations or transactions"). Under this view, a relator who is barred because he has derived some of his fraud information from a public disclosure may still bring the claim as an original source if he has direct and independent knowledge of some other essential element of the claim.

Second, my view of "based upon" would admittedly require a factual inquiry into the basis of a qui tam relator's allegations. Whenever there were public disclosures revealing both the true and the misrepresented facts, a defendant would no doubt claim that the relator derived his information from these disclosures. In response, it may be easier for the relator to establish himself as an "original source" of the information than to successfully disprove a causal link between the public disclosures and his qui tam claim. The original source exception would sometimes be invoked by a relator with a claim that is not technically derived from public disclosures, but that is difficult to

separate from those disclosures. This would be particularly true in the case of widely publicized disclosures, such as those in Judge Wald's example. If the relator in her example had *prior* direct knowledge of the fraud allegations revealed in the newspaper articles, but failed to file suit until after the articles appeared (a scenario quite similar to Mistick's), it may well be easier for that relator to simply identify its prior "original source" of the information than to prove that its qui tam action is not causally linked with the very public disclosures.

The majority has sought to discredit the foregoing analysis. The majority's response inevitably has some force, but that is so because minor, unintended consequences may result from our effectuating the plain meaning and evident intent of a complex federal statute. But only my reading of the jurisdictional bar gives effect to (and fulfills Congress's intent regarding) both the "based upon" language and the "original source" exception, without ignoring the plain meaning of either phrase. The intent of the "original source" exception is to allow one who contributes valuable, first-hand information regarding a fraud on the government to bring a qui tam action whether or not that information (or possibly other information related to the fraud) was publicly disclosed, and whether or not that relator can prove that his claim is not derived from these disclosures. The "based upon" requirement is intended to foreclose parasitic qui tam suits that derive their claim from publicly disclosed information. Taken together, these two requirements will bar actions by relators who piggyback on public disclosures and cannot demonstrate that they have contributed any useful (i.e., independent and direct) information regarding a fraud on the government.

## E. *Purpose of Qui Tam Actions*

### 1. Legislative Intent

Even if I were to ignore the plain meaning of the FCA and to instead look to Congress's alleged intent in amending the statute in 1986, I believe that my reading of "based upon" more fully effectuates *all* of Congress's goals. Congress had three primary aims in enacting the 1986 amendments: (1) encouraging those with information regarding frauds on the government to disclose this information; (2) discouraging parasitic qui tam actions that simply take advantage of information already in the public domain; and (3) assisting--and prodding--the government to act upon information that it had been (or is being) defrauded. *See* S.Rep. No. 99-345, at 1-8, 23-24 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5266, 5266-73, 5288-89; *cf.* Thompson, *supra*, at 693 ("Congress not only wanted to expose fraud but also wanted to encourage the use of nongovernmental resources to activate and advance qui tam cases to prosecution."). My interpretation of "based upon" effectuates all three of these goals, while the view adopted by the majority in this case will in many situations only advance the first goal.

Initially, I note that it is only the hair-trigger invocation of the jurisdictional bar, created by our precedent in *Stinson*, that renders the strained interpretation of "based upon" even arguably necessary. Under *Stinson*, the phrase "public disclosure" is something of a misnomer. While it may conjure up images of a widely disseminated piece of information or something divulged at a press conference, it includes information revealed to a small

number of persons, such as evidence disclosed to a single litigant through unfiled state-court discovery (or, under the majority's holding today, information obtained from a single FOIA request). *See supra* Part I. Therefore, a "public disclosure" will exist in a great number of qui tam cases, foreclosing all actions "based upon" these disclosures if not brought by an original source.

In the paradigmatic whistleblower case, the varying interpretations of "based upon" will usually lead to the same result. When a public disclosure is widely disseminated, such as through a filing in a highly publicized legal case or in a press conference by a whistleblower or the government agency involved, the information regarding the fraud will have been brought forth, anyone who is
not an original source will almost certainly be prevented from demonstrating that their claim was not derived from the highly publicized public disclosure, and the government will be hard pressed to sit on the information that it was defrauded, given the publicity.

However, in the case of a "public disclosure" in legal construct only, the different interpretations of "based upon" will lead to varying results, and, I contend, the plain reading of "based upon" will most fully effectuate *all* of the goals Congress sought to advance in the 1986 amendments. The argument that a broad reading of "based upon" most fully effectuates Congress's intent to preclude parasitic suits "ignores the reality that the term 'public disclosures' encompasses disclosures that receive all different degrees of publicity, reaching audiences ranging from one person to millions of people." Vogel, *supra*, at 513.

When allegations have been "publicly disclosed" under *Stinson 's* broad interpretation of this phrase, but have been revealed to few people, rather than "millions of people," the purpose of the FCA is best fulfilled by encouraging those who discover the information through some other source to bring suit. This can be seen from our decision in *Stinson*, and in the majority's holding today that information obtained through a FOIA request is a "public disclosure." In both cases, if the narrow group of individuals (as few as one) who are privy to these "disclosures" decide to keep them secret, at least two purposes of the FCA--encouraging the disclosure of fraud, and prodding and/or assisting the government in prosecuting this fraud--will be furthered only if another individual who discovers the fraud through some other means is allowed to bring a qui tam action.

2. Legislative History

While disclaiming reliance on legislative history, *see* Maj. Op. at 19 n.9, the majority cites two statements by FCA sponsors in support of its argument. However, as this court has previously noted, statements can easily be found pointing in opposite directions when it comes to the FCA's legislative history. *See Stinson*, 944 F.2d at 1154 ("The bill that eventuated in the 1986 amendments underwent substantial revisions during its legislative path. This provides ample opportunity to search the legislative history and find some support somewhere for almost any construction of the many ambiguous terms in the final version.").

The D.C. Circuit in *Findley* purported to rely more extensively on legislative history, arguing that, in changing

the jurisdictional bar of the FCA from claims "based upon evidence or information in the possession of the United States" to those "based upon the public disclosure of allegations or transactions," Congress altered the focus of the bar from information in the government's possession to "fraud already exposed in the public domain." *Findley*, 105 F.3d at 684. More precisely, however, what Congress intended was to change the focus from information in the government's possession to information that is sufficiently publicly disclosed to bring the fraud to the government's attention and to spur it into acting upon the information.

If Congress had the intent claimed by the *Findley* court, it could simply have substituted in the jurisdictional bar the phrase "information that has been publicly disclosed" for "information in the possession of the United States." The statute would then have read, in relevant part, "No court shall have jurisdiction over an action under this section *based upon evidence or information that has been publicly disclosed* in a criminal, civil, or administrative hearing, [etc.]...." Instead, Congress completely changed the focus of the key phrase "based upon," eliminating a structure in which the phrase referred to "evidence or information," and creating one in which it referred to "public disclosure of allegations or transactions." The actual statute now reads, "No court shall have jurisdiction over an action under this section *based upon the public disclosure of allegations* or transactions in a criminal, civil, or administrative hearing, [etc.]...."

There is a fundamental difference between a claim that is based upon certain *information* that has been publicly disclosed, and a claim that is based upon certain enumerated public *disclosures*. This difference evinces an

intent to focus not broadly on information in the public domain, but narrowly on the specific public disclosures that contain the information. The *Findley* court interpreted "based upon" as if Congress chose to make the former change-- precluding suits based upon certain *information*-- rather than the change it actually made, in which "based upon" refers to certain disclosures. While this change in focus is not conclusive in and of itself, I believe the D.C. Circuit's misreading of this substantial change undercuts its argument regarding Congress's intent.

### F. *Summary*

In sum, I do not believe we can escape the plain meaning of the phrase "based upon" in the FCA's jurisdictional bar. There is no justification for giving this phrase a convoluted reading that not only ignores its plain meaning, but that also extends *Stinson 's* error of interpreting the jurisdictional bar so as to foreclose virtually all qui tam suits that do not fit within the mold of the paradigmatic insider/whistleblower case. The plain meaning most effectively fulfills Congress's intent, and does so without ignoring or rendering meaningless any portion of the 1986 amendments.

## III. Disposition of Mistick's Qui Tam Suit

As I disagree with the majority's conclusion that the material obtained through Mistick's FOIA request was a public disclosure, I would find that the misrepresented state of facts underlying its qui tam claim had not been publicly disclosed. Therefore, under our holding in *Dunleavy* that the jurisdictional bar does not apply unless both the true and the misrepresented facts have been publicly disclosed

through one of the enumerated sources, Mistick's qui tam claim is not jurisdictionally barred.

But even if the FOIA material were to constitute a public disclosure, Mistick's qui tam action may not be "based upon" public disclosures because it claims that it learned of the true state of facts not through the public disclosure in the state-court action, but earlier, through meetings with the maker of Glid Wall, and through its own independent investigations. Because it is ultimately a fact question whether Mistick's information underlying its qui tam action was derived from the public disclosures, and because the District Court did not reach this issue, I would remand for the District Court's determination of this issue in the first instance. *Cf. Siller*, 21 F.3d at 1349 (remanding for the district court to determine whether the allegations in a relator's action were derived from a public disclosure); *Mortensen* v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 n. 16 (3d Cir.1977) ("[T]he district court is free to determine facts relevant to its jurisdiction....").

## IV. Conclusion

The policy consideration undergirding the restrictive view of qui tam litigation (and the expansive view of the jurisdictional bar) is that it is necessary to eliminate opportunistic and parasitic lawsuits. I share the view that such suits are an abomination. I believe, however, that *Stinson, Findley*, and their progeny (including the majority opinion here) cut such a broad swath that they eviscerate bona fide suits, such as the one at bar, in a laudable but misguided effort to halt a feared torrent of litigation.

In my view, the recent amendments to the False Claims Act were intended to encourage qui tam suits that do not derive their knowledge of an underlying fraud from truly public disclosures, and to encourage those with information about frauds on the government to inform the government about the fraud, assist the government in bringing legal action to bear against the defrauders, and, if necessary, prod the government into action. I see the majority opinion as inconsistent with this intent of Congress. More importantly, it is inconsistent with the plain language of the FCA. Because the majority's misreading affects the outcome of this case, I respectfully dissent.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

**APPENDIX B**

Filed October 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3248

UNITED STATES OF AMERICA ex rel.
MISTICK PBT and MISTICK PBT

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH; L.D. ASTORINO, & ASSOCIATES, LTD. (formerly known as L.D. ASTORINO ARCHITECTS, INC.); ASTORINO BRANCH ENVIRONMENTAL INC.; ASTORINO BRANCH ENGINEERS; ERNEST E. MILLER, individually; DAVID B. WASHINGTON, individually; LOUIS D. ASTORINO, individually; DENNIS L. ASTORINO, individually; PATRICK I. BRANCH, individually; BERNARD J. QUINN, individually

Mistick PBT,
Appellant

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(D.C. No. 95-cv-01876)
Aruged June 9, 1998

Before BECKER, *Chief Judge*, ALITO and ALDISERT,
*Circuit Judges*

(Opinion Filed July 30, 1999)

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**ORDER AMENDING SLIP OPINION**

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The slip opinion filed on July 30, 1999 in the above case is hereby amended as follows:

On page 2, attorney: Arnd N. Von Waldow, Esq.,
Reed, Smith, Shaw & McClay,
435 Sixth Avenue
Pittsburgh, PA 15219

should be replaced with: Louis C. Long (Argued),
Meyer, Darragh, Buckler,
Bebenek & Eck,
2000 Frick Building
Pittsburgh, PA 15219.

BY THE COURT:

/s/Samuel A. Alito, Jr.
Circuit Judge

Date: October 18, 1999

A True Copy:
Testee:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel. MISTICK PBT and MISTICK PBT, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Civil Action No. 95-1876 |
| HOUSING AUTHORITY OF THE CITY OF PITTSBURGH; L.D. ASTORINO & ASSOCIATES, LTD., formerly known as L.D. Astorino Architects, Inc.; ASTORINO BRANCH ENVIRONMENTAL, INC.; ASTORINO BRANCH ENGINEERS; ERNEST E. MILLER, individually; DAVID B. WASHINGTON, individually; LOUIS D. ASTORINO, individually; DENNIS L. ASTORINO, individually; PATRICK I. BRANCH, individually; and BERNARD J. QUINN, individually, | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

BLOCH, District J.

Presently before the Court are two motions to dismiss filed on behalf of the defendants.[1] For the reasons set forth in this opinion, the Court will grant defendants' motions.

I. Background

This is a qui tam action brought pursuant to the False Claims Act (FCA), 31 U.S.C. §3729, et seq. A brief rendition of the facts underlying this case are as follows.

Since August, 1986, regulations promulgated by the United States Department of Housing and Urban Development (HUD) have required that lead-based paint abatement work be performed at certain HUD-funded public housing units, in order to eliminate the various health hazards associated with lead-based paint.

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[1] Specifically, one motion was filed on behalf of L.D. Astorino & Associates, Ltd., Astorino Branch Environmental, Inc., Astorino Branch Engineers, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch, and Bernard J. Quinn (Astorino defendants); the other was filed on behalf of the Housing Authority of the City of Pittsburgh, Ernest E. Miller and David B. Washington (HACP defendants).

See generally 24 C.F.R. Part 35. Specifically, HUD Guidelines recommend that lead-based paint either be replaced, removed or covered over and/or sealed with what is called an "encapsulant." See Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing, §7.3, at 70-71.

Defendant L.D. Astorino & Associates, Ltd., is an architectural firm that developed certain specifications for renovation and improvement work at two residential housing projects of the Housing Authority of the City of Pittsburgh (HACP) (the Bedford and Addison projects). These specifications included, inter alia, lead-based paint abatement work. In its original specifications, submitted to the HACP in April and June, 1989, the Astorino defendants specified encapsulation as their chosen abatement method, and included a specification for an alleged encapsulation product called "Glid Wall," manufactured by the Glidden-Paint Company (Glidden).

Plaintiff, a general contractor, submitted bids to the HACP for the Bedford and Addison housing projects in June and July, 1989, basing such bids, in part,

on the Astorino defendants' specifications. Plaintiff's bids were ultimately accepted and, in January, 1990, plaintiff began to serve as the general contractor for the lead-based paint abatement work being performed at both housing projects.

Shortly thereafter, during March, 1990, the Astorino defendants changed the "Glid Wall" specification to an alternative encapsulation product called "Zomat," allegedly due to the fact that Glidden neither recommended nor sold "Grid Wall" products for use in the abatement of lead-based paint. This changed specification allegedly resulted in an increase to the direct costs of the HACP of at least $751,000.

In July, 1991, plaintiff filed a lawsuit against the HACP in the Court of Common Pleas of Allegheny County, seeking to recover alleged delay damages caused by the changed specification discussed above. Thereafter, in November, 1991, the HACP filed a third-party complaint against some of the Astorino defendants for contribution and/or indemnity.

In September, 1993, during the pendency of the state court action, plaintiff's counsel requested certain information from HUD under the Freedom of Information Act (FOIA), 5 U.S.C. §552. This request was allegedly made in connection with plaintiff's independent investigation involving the HACP's relationship with HUD--notably, plaintiff alleges that its FOIA request was unrelated to the state court action.[2]

Acting upon plaintiffs FOIA request, in October, 1993, HUD made available to the plaintiff certain files concerning various HUD-funded public housing projects in the Pittsburgh area, including the Bedford and

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[2] The plain language of plaintiff's FOIA request, however, suggests otherwise. Specifically, it reads, in pertinent part, as follows:

> Pursuant to the Freedom of Information Act, please provide me copies of correspondence to HUD from the Housing Authority of the City of Pittsburgh regarding Astorino & Associates and the Authority's specifications of "Glidwall" as a lead project encapsulant on [the Bedford] project.

(FOIA request, attached as Exhibit 1 to plaintiff's supplemental brief in opposition to defendants' motions to dismiss (document No. 40)).

Addison projects. In reviewing such files, plaintiff allegedly discovered, inter alia, that the defendants made false statements to HUD in connection with the lead-based paint abatement work being performed at the Bedford and Addison projects.[3] Specifically, plaintiff alleges that, in order to obtain government funds to cover the direct cost increase caused by the Astorino defendants' changed specification, the defendants submitted false claims and records to HUD, designed to give HUD the impression that the changed specification from "Glid Wall" to "Zomat" was an unavoidable development caused by a recent change in Glidden's policy. Plaintiff, however, alleges that Glidden's policy regarding the use of "Glid Wall" for lead-based paint abatement work had been in effect since at least 1987, and that the defendants knew of this fact at the time that they submitted their claims.

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[3] Throughout the time period relevant to this case, both the Bedford and Addison housing projects were associated with and financed by HUD. Under HUD's Comprehensive Improvement Assistance Program, funds are made available to local housing authorities, such as the HACP, for certain activities, including lead-based paint abatement work. Distribution of such funds is approved by HUD on the basis of applications and/or claims submitted by the local housing authorities. See generally 24 C.F.R. Part 968.

Thereafter, in October, 1994, plaintiff filed a motion in the state court action for leave of court to file a second amended complaint--to include a direct cause of action against the Astorino defendants for fraud. In support thereof, plaintiff alleged, inter alia, that "through the course of discovery, [plaintiff]...discovered evidence of which it was previously unaware demonstrating that [the HACP and the Astorino defendants] acted in complete and willful disregard of facts in their possession in specifying the use of Glid Wall as a lead-based paint encapsulant for both the Bedford and Addison Projects."

In December, 1994, plaintiff's motion was denied, based, in part, upon the state court judge's findings that neither the HACP nor the Astorino defendants intended to specify a product that would not abate lead-based paint, and that plaintiff's allegations showed, at most, a failure to exercise reasonable care on the part of the defendants.

Plaintiff subsequently filed the within qui tam action in November, 1995, under seal, pursuant to the FCA, 31 U.S.C. §3729, et seq. In July, 1996, the Court

granted the government's motion to decline intervention, and thereby ordered that plaintiffs complaint be unsealed and served on all defendants.[4]

After being served, the Astorino and HACP defendants filed separate motions to dismiss in which they asserted, inter alia, that this Court lacked subject matter jurisdiction over the within action. Thereafter, on November 22, 1996, plaintiff filed an amended complaint. In response, both the Astorino and HACP defendants filed the renewed and/or supplemental motions to dismiss which are presently before the Court. Because they raise essential the same issues, the Court will address the defendants' motions together

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[4] Under the FCA, a qui tam complaint must first be served on the United States, as opposed to the defendant(s). It must be filed in camera and remain under seal for at least 60 days thereafter. See 31 U.S.C. §3730(b)(2). Within that period, the government may intervene and assume prosecution of the case. If the government chooses to do so, it becomes the primary responsible party. If, however, it chooses not to intervene, the plaintiff, or "relator," may proceed to seek recovery of damages and penalties in accordance with 31 U.S C §§3730(c)(3) and (d)(2).

II. Discussion

A. Judicial estoppel

The defendants first request that plaintiff be judicially estopped from asserting the claims involved in this qui tam action. In support of this argument, defendants contend that plaintiffs' pleadings are "replete with inconsistencies" and that they contradict allegations made by the plaintiff in the prior state court action. The Court is not persuaded by defendants' argument in this regard.

The Third Circuit recently discussed the principles of judicial estoppel in Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996), as follows:

> Judicial estoppel, sometimes called the "doctrine against the assertion of inconsistent positions," is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from "playing 'fast and loose with the courts.'" "The basic principle...is that absent any good explanation, a party should not be allowed to

> gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."

Id. at 358 (citations omitted). See also Donaldson v. Bernstein, 104 F.3d 547, 555-56 (3d Cir. 1997).

Judicial estoppel is an equitable doctrine, invoked by a court in its discretion. See McNemar v. Disney Store. Inc., 91 F.3d 610, 617 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 958 (1997). "[E]ach case [where a judicial estoppel argument is raised] must be decided upon its own particular facts and circumstances." Id. (citing Scarano v. Central Railroad Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953)).

"Asserting inconsistent positions does not trigger the application of judicial estoppel unless 'intentional self-contradiction is...used as a means of obtaining unfair advantage.'" Ryan, 81 F.3d at 362 (citing Scarano, 203 F.2d at 513). Moreover, the doctrine "is not met to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no

evidence of intent to manipulate or mislead the courts." Ryan, 81 F.3d at 365. Rather, as recognized by the Third Circuit, "[j]udicial estoppel is an 'extraordinary remed[y] to be invoked [only] when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" Id. at 365 (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir.), cert. denied, 488 U.S. 967 (1988) (Stapleton, J., dissenting)) (emphasis added).

The Court has fully examined the pleadings, briefs and accompanying exhibits submitted by all parties. Upon review, the Court finds that it would be inappropriate to invoke the judicial estoppel doctrine in this case. Although portions of the plaintiff's pleadings in this action and in the prior state court action appear to be somewhat inconsistent in some minor respects--particularly, with regard to the time period during which plaintiff became aware of the defendants' alleged fraudulent behavior--the Court cannot say with certainty that such inconsistencies were made by the plaintiff in bad faith or with the intent to manipulate the Court. See Ryan, 81 F.3d at 365. In this light, to judicially estop plaintiff from further pursuing the

instant action, as the defendants request, would be unduly harsh, inequitable, and unjustified.

Accordingly, to the extent that they are based upon the doctrine of judicial estoppel, the Court will deny the defendants' motions to dismiss.

B. Jurisdiction

Defendants next assert that, pursuant to §3730(e) of the FCA, this Court is without subject matter jurisdiction to hear the instant action. The Court agrees.

Section 3730(e) of the FCA provides, in part, as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4)(A). Thus, this Court cannot exercise jurisdiction over a qui tam complaint brought

under the FCA when the action is based on publicly disclosed information, unless the plaintiff was an original source of such information. Id.

Relying upon the statutory language of the FCA, defendants contend that subject matter jurisdiction is lacking for the following reasons: (1) this action is "based upon the public disclosure of allegations or transactions in a...civil...hearing," as that phrase is used in 31 U.S.C. §3730(e)(4)(A), supra; and (2) the plaintiff is not an "original source" of the information upon which this action is based. See 31 U.S.C. §3730(e)(4)(B). The Court will address each of the defendants' contentions below.

1. Public disclosure

In support of its public disclosure argument, defendants contend that the within action is based upon information obtained by the plaintiff during the course of discovery in the prior state court action, and pursuant to its FOIA request. Defendants contend that all such information falls within the public disclosure language of the FCA, 31 U.S.C. §3730(e)(4)(A). The Court agrees with the defendants' contentions on this issue.

As stated by the Third Circuit, the FCA's jurisdictional bar was "designed to preclude qui tam suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co., 944 F.2d 1149, 1155-56 (3d Cir. 1991). See also United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir. 1993), cert. denied, 508 U.S. 973 (1993). In this light, the Third Circuit has held that the reference in the statutory jurisdictional bar to a civil "hearing" is indeed broad enough to encompass the full range of proceedings in a civil lawsuit, including discovery. Stinson, 944 F.2d at 1155-57.

Thus, assuming it is not subject to a court protective order, information contained in civil discovery material is "publicly disclosed" for purposes of the FCA's jurisdictional bar. Id. at 1158. Moreover, it is not significant for purposes of interpreting the "public disclosure" provision of the FCA whether such discovery

material was in fact filed with the court. Id. at 1158-60 (information exchanged between private parties through discovery but not filed with the court is "potentially accessible to the public" and, thus, is publicly disclosed).

Likewise, when an individual requests information pursuant to the Freedom of Information Act (FOIA), and thereafter receives such information, that information is deemed to be publicly disclosed within the meaning of the FCA's jurisdictional bar.

> [Indeed,] [j]ust as "civil" discovery is public, it must be the case that information obtained pursuant to an FOIA request has been made public through the "administrative" process and cannot form the basis of a qui tam action. If that were not the case then, like court records, public agency records would be flooded with citizens requesting information in order to bring qui tam suits.

United States ex rel. Herbert v. National Academy of Sciences, Civ. A. No. 90-2568, 1992 WL 247587, at *6 (D.D.C. September 15, 1992), appeal dismissed, 1994 WL 163758 (D.C. Cir. March 21, 1994). See also United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512,

1520 (9th Cir. 1995) (in the FOIA context, information is deemed "publicly disclosed" for purposes of the FCA jurisdictional bar when a member of the public requests the information and receives it from the government), cert. granted in part, ___ U.S. ___, 117 S.Ct. 293 (1996); United States ex rel. Burns v. A.D. Roe Co., Inc., 919 F. Supp. 255, 257 (W.D. Ky. 1996) (same).

In this case, plaintiff acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, inter alia, discovery in the prior state court action and its FOIA request.[5] It logically follows that this action is based, at least in part, on "publicly disclosed" information within the context of §3730(e)(4)(A) of the FCA.[6]

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[5] Specifically, plaintiff acknowledges: (1) that it learned of defendants' alleged fraudulent statements to HUD through its FOIA request; and (2) that "over the March to September 1994 period, certain documentary and other evidence relevant to the present action was 'churned up' in the course of discovery in the [state court action."] (See plaintiff's brief in opposition to the Astorino defendants' motion to dismiss (document No. 30), at p. 18).

[6] Although the Court has been unable to discern any Third Circuit authority on the specific issue, the Court is in agreement with several other circuit courts of appeals that an action is "based upon the

2. Original source

Having concluded that plaintiff's complaint is indeed based upon publicly disclosed information, the Court must now determine whether the plaintiff was an "original source" of that information within the meaning of the FCA. Only if plaintiff is an "original source" will this Court have subject matter jurisdiction over the within action.

The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. §3730(e)(4)(B) (emphasis added). Moreover, to be an original source, a "relator must possess substantive information about the particular fraud, rather than merely background information which enables a

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public disclosure of allegations or transactions in a...civil...hearing," within the meaning of the FCA, if it is based in any part on such publicly disclosed information. See, e.g., United States ex rel. Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995); Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 567 (11th Cir. 1994); Kreindler, 985 F.2d at 1158.

putative relator to understand the significance of a publicly disclosed transaction or allegation." Stinson, 944 F.2d at 1160.

As recognized by the Third Circuit, "[t]he paradigmatic 'original source' is a whistleblowing insider." Id. at 1161. This covers "individuals who are close observers or otherwise involved in the fraudulent activity." Id. Under the facts of this case, the plaintiff clearly does not qualify as a "whistleblowing insider."

"Other relators may also qualify [as original sources] if their information results from their own investigations." Id. Plaintiff contends that it meets this standard. However, assuming arguendo that the plaintiff indeed performed its own investigation into defendants' allegedly fraudulent activity, as it contends, the FCA still requires that the plaintiff have direct and independent knowledge of the information on which its allegations are based. See 31 U.S.C. §3730(e)(4)(B).

To be "direct" within the meaning of the FCA's jurisdictional bar, a relator's knowledge must be "marked by absence of an intervening agency,

instrumentality, or influence: immediate." Stinson, 944 F.2d at 1160 (quoting Webster's Third New International Dictionary 640 (1976)). In this case, because plaintiff admittedly became aware of the defendants' allegedly fraudulent behavior via "an intervening agency, instrumentality, or influence"--that is, through discovery in the prior state court action and by way of its FOIA request--the Court finds that plaintiff does not have "direct" knowledge of the defendants' allegedly false statements to HUD. See, e.g., Stinson, 944 F.2d at 1160-61.

Likewise, the Court finds that the plaintiff does not have "independent" knowledge of the information upon which the within action is based. Indeed, as stated by the Third Circuit, "a relator who would not have learned of the information [upon which his or her qui tam complaint is filed] absent public disclosure [does] not have 'independent' information within the statutory definition of 'original source.'" Id. at 1160.

In light of this Court's conclusion that the information obtained by the plaintiff through discovery in the prior state court action and through plaintiff's FOIA

request was "publicly disclosed" within the context of the FCA jurisdictional bar, it follows that plaintiff's knowledge is not "independent" of any such public disclosure[s]. See, e.g., id. at 1160.

Therefore, because plaintiff has neither "direct" nor "independent" knowledge of the information on which its allegations are based, as required by §3730(e)(4)(B) of the FCA, the plaintiff cannot be an "original source" within the context of the FCA's jurisdictional bar.

III. Conclusion

Based upon the above findings, the Court concludes that subject matter jurisdiction is indeed lacking under §3730 of the FCA. For this reason, the Court will grant the defendants' respective motions to dismiss and thereby dismiss this case, with prejudice.[7]

An appropriate Order will be issued.

Date: March 26, 1997 /s/Alan N. Bloch

[7] In light of its jurisdictional ruling, the Court need not address any of the remaining arguments raised in support of the defendants' motions.

United States District Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA ex rel. MISTICK PBT and MISTICK PBT, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Civil Action No. 95-1876 |
| HOUSING AUTHORITY OF THE CITY OF PITTSBURGH; L.D. ASTORINO & ASSOCIATES, LTD., formerly known as L.D. Astorino Architects, Inc.; ASTORINO BRANCH ENVIRONMENTAL, INC.; ASTORINO BRANCH ENGINEERS; ERNEST E. MILLER, individually; DAVID B. WASHINGTON, individually; LOUIS D. ASTORINO, individually; DENNIS L. ASTORINO, individually; PATRICK I. BRANCH, individually; and BERNARD J. QUINN, individually, | ) | |
| Defendants. | ) | |

# ORDER

AND NOW, this 26th day of March, 1997, upon consideration of the Motion to Dismiss the First Amended Complaint (document No. 33) filed by Defendants, L.D. Astorino & Associates, Ltd., Astorino Branch Environmental, Inc., Astorino Branch Engineers, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch, and Bernard J. Quinn, in the above captioned matter on December 16, 1996, and upon consideration of the Motion to Dismiss First Amended Complaint (document No. 36) filed by Defendants, Housing Authority of the City of Pittsburgh, Ernest E. Miller, and David B. Washington, in the above captioned matter on December 16, 1996, and upon further consideration of Plaintiff's Responses thereto, and for the reasons set forth in this Court's Memorandum Opinion filed herewith.

IT IS HEREBY ORDERED that said Motions are GRANTED and the above captioned matter is DISMISSED with prejudice.

/s/Alan N. Bloch
United States District Judge

cc: John E. Beard, Esquire
1500 Oliver Building, Pittsburgh, PA 15222

Asst. U.S. Atty. Robert L. Eberhardt
633 U.S. Post Office & Courthouse, Pittsburgh, PA 15219

Michael F. Hertz, Esquire
U.S. Department of Justice
P.O. Box 261, Ben Franklin Station, Washington, DC 20044

Arnd N. Von Waldow, Esquire
2000 Frick Building, Pittsburgh, PA 15219

David J. Hickton, Esquire
2400 Fifth Avenue Place, Pittsburgh, PA 15222

**APPENDIX D**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

August 13, 1999

**No. 97-3248**

**RE: Mistick PBT v. Housing Auth Cty Pgh**

Present: ALITO, Circuit Judge

Motion filed by Appellant for Leave to File Attachment to Petition for Rehearing.

/s/ Charlene Crisden
Charlene Crisden
Case Manager
Direct Dial 597-5846

*Petition for Rehearing is attached.

ORDER

The foregoing motion is granted. The significance, if any, of the attachment is left for the consideration of the ____ court.

By the Court,

/s/Samuel A. Alito, Jr.
Circuit Judge

Dated July 20, 1999

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 97-3248

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UNITED STATES OF AMERICA ex rel.
MISTICK PBT and MISTICK PBT

v.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH;
L.D. ASTORINO & ASSOCIATES, LTD.
(formerly known as L.D. ASTORINO ARCHITECTS, INC.);
ASTORINO BRANCH ENVIRONMENTAL INC.;
ASTORINO BRANCH
ENGINEERS; ERNEST E. MILLER, individually;
DAVID B. WASHINGTON,
individually; LOUIS D. ASTORINO, individually;
DENNIS L.
ASTORINO, individually; PATRICK I. BRANCH,
individually; BERNARD
J. QUINN, individually

Mistick PBT,

Appellant

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SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge, SLOVITER, MANSMANN, GREEENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, Circuit Judges, and ALDISERT, Senior Circuit Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/Samuel A. Alito, Jr.
Circuit Judge

DATED: September 9, 1999

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*As to panel rehearing only.

## APPENDIX F

## 1986 AMENDMENTS TO THE FALSE CLAIMS ACT

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**HON. HOWARD L. BERMAN**
OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Wednesday, July 14, 1999*

Mr. BERMAN. Mr. Speaker, thirteen years ago, Congress passed the 1986 Amendments to the False Claims Act. They have been an enormous success.

As the principal sponsors of those amendments, Senator GRASSLEY and I are gratified to see how well they have worked. Recoveries to the United States Treasury pursuant to the False Claim Act have increased a remarkable 40-fold compared to the period before the amendments were adopted. More than $2.5 billion has been recovered to date from *qui tam* lawsuits, with half of that amount coming in the last few years. Another $3 billion in recoveries is anticipated from the pending cases the government has already joined. This exponential growth in recoveries to the Treasury is expected to continue.

The biggest payoff however has been in the deterrence of fraud. An analysis by William L. Stringer, the former Chief Economist for the U.S. Senate Committee on Budget, has estimated the deterrence attributable to the *qui tam* provisions of the False Claims Act for the first 10 years (through 1996) is $35 billion to $75 billion. He estimates that the next 10 years will produce additional

savings of $105 billion to $210 billion. Indeed, many believe that the substantial reduction in Medicare outlays in recent years is due in no small part to the effect these amendments have had in curtailing fraud.

It is not an overstatement to suggest that there has been a cultural shift within companies that do business with the government. Because of the vigilance of the citizenry and the use of the *qui tam* provisions of False Claims Act, companies and entities are changing the way they do business with the government. Instead of developing strategies of "revenue enhancement" when dealing with the government, these same entities are developing new compliance programs to ensure that the government is not overcharged. This shift has occurred for one fundamental reason: The risks of getting caught, exposed and subjected to substantial penalties have grown tremendously as a direct result of the reinvigoration of the government's fraud enforcement caused by the 1986 amendments.

This cultural change is very much what Senator GRASSLEY and I hoped and expected would develop with the enactment of the 1986 amendments. We wanted to encourage, with appropriate incentives, the citizenry to the take us the fight against fraud perpetrated against our government. We had hoped to forge a public/private partnership to go after those who would deliberately overcharge (or underpay) the government. People who are insiders within companies and witness fraud, businesses that become aware of illegal practices by competitors, individuals who through their own investigative efforts turn up information of government overcharges (or underpayments) and, equally important, the private attorneys and law firms who work with the Justice Department and heavily invest their own time, resources,

and expertise over many years these individuals, companies and attorneys have collectively turned the *qui tam* provisions of the False Claims Act into the single best example of privatization success.

In the thirteen years since the 1986 amendments were adopted, more than cases have been filed. As a result, a substantial body of False Claims law has developed.

I rise today to express the grave concerns that Senator GRASSLEY and I have about judicial decisions involving one important provisions of the law: the "public disclosure' bar. We have reviewed with dismay opinions of many courts that have misunderstood and therefore, misinterpreted what Congress intended when in adopted this provision. The courts' interpretations of the "public disclosure" bar are often in conflict with each other, resulting in great confusion. Worse, taken together these decisions many discourage many good cases from being filed, threatening to seriously undermine the effectiveness of the Act.

Because of our concerns about judicial interpretation of the "public disclosure" bar, we wrote to Attorney General Reno to set forth our views in detail about this provisions and the various circuit court interpretations. We ask that the Department of Justice, as the government agency with primary responsibility for enforcing the False Claims Act, be especially vigilant in helping courts correctly implement the Congressional policy that underlies the "public disclosure" bar.

We also believe that it would be useful for courts to understand what we as the principal authors of the law intended in creating the "public disclosure' bar.

By introducing our letter to Attorney General Reno into the CONGRESSIONAL RECORD, it is our intention to make it available to federal courts for guidance and perspective.

# FALSE CLAIMS ACT

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**HON. HOWARD L. BERMAN**
OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Wednesday, July 14, 1999*

Mr. BERMAN. Mr. Speaker, I submit the following for the RECORD:

Hon. JANET RENO,
Attorney General of the United States,
U.S. Department of Justice,
Washington, DC.

DEAR MADAM ATTORNEY GENERAL:

As you know, we are the principal House and Senate sponsors of the 1986 Amendments to the False Claims Act, 31 U.S.C. §3729, et seq. ("the Amendments"). We have watched with pride the remarkable success of the amendments in bringing to the attention of the federal government hundreds of cases of fraud. We are particularly pleased with the qui tam provisions of the Amendments, which have resulted in cases that have returned $2.3 billion to the federal Treasury.

With dismay, however, we have watched the federal courts interpret several sections of the Amendments in ways that directly contravene Congressional intent, and, of even greater significance, discourage and foreclose potential relators from bringing meritorious cases. In

particular, we are extremely concerned with the courts' crabbed interpretations of the public disclosure bar- §3730(e)(4)(A) and (B). That provision, which was drafted to deter so- called "parasitic" cases, has been converted by several circuit courts into a powerful sword by which defendants are able to defeat worthy relators and their claims. If this trend continues, we fear that the very purpose of the Amendments-"to encourage more private enforcement suits"-ultimately will be undermined. See S. Rep. No. 99-345, at 23-24 (1986).

Thus, we believe it is imperative that the Department of Justice ("the Department") adopt and adhere publicly to an interpretation of the public disclosure bar that comports with the plain meaning of the statute and the Congress' obvious intent. The Department's role in this regard is critical. First, of course, the Department is often involved as a party in cases where the public disclosure bar is raised, and it is entitled and expected to make its views known. Even in cases where the Department determines not to intervene, Congress intended for the Department to be involved in monitoring cases, in part to address questions significant to the ongoing operation of the statute. See e.g. §3730(c)(3) and (c)(4). Finally, as the agency charged, in effect, with the administration of the False Claims Act, the courts are likely to accord significant deference to the Department's interpretation of the Act, and we believe the Department has an obligation to the Congress and to the courts to articulate those views.

With this letter, we intend to provide a detailed explanation of our view of the public disclosure bar, focusing in particular on some of the cases where we believe the courts have misinterpreted the law. In order to place that discussion in context, we want first to explain the

origin and significance of the public disclosure bar so that the cases can be viewed in light of Congress' intent.

The public disclosure bar is intertwined inextricably with the history of the qui tam provisions of the statute. From its enactment in 1863, the False Claims Act allowed a relator to bring a qui tam action even if the Government already knew of, investigated and even criminally prosecuted the identical fraud. Such parasitic suites, made infamous in the Supreme Court's decision in Marcus v. Hess, 317 U.S. 537 (1943), allowed relators to recover if they "contributed nothing to the discovery of this crime." Id. At 545. To correct that obvious inequity, Congress enacted the government knowledge bar in 1943, which prohibited qui tam suits based on information in the Government's possession. The government knowledge bar, however, was interpreted too broadly by the courts. If information about fraud was in a file somewhere in the vast federal bureaucracy, a qui tam case was barred even if the government was unaware of the information in its files or had done nothing to pursue it. Indeed, one court held that even if it was the relator him or herself who had reported the fraud to the federal government, their case was precluded on the theory that the government had knowledge of the fraud before the relator filed their case. See, e.g. United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).

The 1986 Amendment sought to restore some balance between these two extreme regimes. Unquestionably, Congress wanted to prohibit qui tam cases that merely copies a federal criminal indictment and to allow those in which the relator simply informed the government of their allegations before filing suit. But there is considerable terrain between these two poles, and it is

here that the courts seem to get lost. The key to navigating the public disclosure bar successfully is understanding Congress' purpose is enacting the Amendments.

Three goals inspired the 1986 Amendments. First and foremost, Congress wanted to encourage those with knowledge of fraud to come forward. Second, we wanted a mechanism to force the government to investigate and act on credible allegations of fraud. Third, we wanted relators and their counsel to contribute additional resources to the government's battle against fraud, both in terms of detecting, investigating and reporting fraud and in terms of helping the government prosecute cases. The reward to the relator is for furthering these goals.

In reversing the old government knowledge bar, however, we wanted to continue to preclude qui tam cases that merely repackage allegations the government can be presumed already to know about because they were disclosed publicly either in a federal proceeding or in the news media. The reason is simple: if the relator simply repeats allegations that he or she heard from someone else and about which the government is already aware and taking action, the relator contributes nothing to the government's efforts to combat fraud. Accordingly, in the 1986 Amendments, we provided that a qui tam case is barred if the relator has based his or her filing upon publicly disclosed allegations unless the relator already has provided information concerning the allegations to the government before filing suit.

Certain courts have exploded this limited bar in ways that mock the very purpose and intent of the 1986 Amendments. A recent case is illustrative. In United States ex rel. Jones v. Horizon Healthcare Corp., No. 97-1635, the

Sixth Circuit Court of Appeals held that Ms. Jones' qui tam action was barred because, before she filed her case, she had filed an application for unemployment insurance with the Michigan Employment Security Commission. Her application stated that she had been fired after reporting to her supervisor at Horizon HealthCare that she believed several claims prepared for submission to Medicare were false. The Court held that Ms. Jones' unemployment application was a public disclosure within the federal government prior to filing her action, her suit was barred.

In both its reasoning and its outcome, Jones strays far from the policies that underlie the public disclosure bar. First, as you know, 3730(e)(4)(A) specifically limits a public disclosure to "allegations or transactions" disclosed in a "criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media. "That list is exclusive, as many of the courts to have considered the question agree. See U.S. ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 744 (3rd Cir. 1997) (recognizing the "prevailing view is that this list constitutes an exhaustive rendition of possible sources.") Only an absurdly broad definition of an "administrative hearing" would put an application for unemployment insurance on that list. And Congress did not intend to enact absurdities.

We did intend, and any fair reading of the statute will confirm, that the disclosure must be in a federal criminal, civil or administrative hearing. Disclosure in a state proceeding of any kind should not be a bar to a subsequent qui tam suit. The reason is grounded in the history of the FCA and the policies underlying the 1986 Amendments that we just reviewed. One thing is common

to the law throughout its history. It was the Federal Government's knowledge of fraud that triggered the government knowledge bar; it was the federal government's indictment in Marcus v. Hess that formed the basis of the parasitic suit. Thus, when it enacted the public disclosure bar in 1986, Congress was concerned about what the federal government knew about fraud, that is, whether the federal government had in its possession sufficient information to investigate and pursue allegations of fraud, and whether that information was sufficiently publicized so that the federal government would be forced to act or explain why it chose not to act. As was noted in the Senate Report on the Amendments: "Unlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body-the Federal Government." S. Rep. 99-345 at 7. To suggest that Congress was concerned with disclosure to anyone other than the federal government when it enacted the public disclosure bar is to ignore history. And to suggest, as the Sixth Circuit held in Jones, that disclosure of fraud to a state agency on an application for unemployment is likely to alert the federal government to fraud is to ignore common sense.[i]

Unfortunately, Jones is by no means an isolated example. U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. 1996) is an equally egregious example of judicial overreaching. In Advance Sciences, the Tenth Circuit held, first, that the listed sources in §3730(3)(4)(A) were not the exclusive means of public disclosure-a holding which, as we have noted already, is simply wrong. The Court went on, however, to hold that a public disclosure

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Footnotes appear at end of letter.

occurs whenever the allegations or transactions are provided to any member of the public who is a "stranger to the fraud." In Mr. Fine's case, the stranger was a representative of the American Association of Retired Persons counseling Mr. Fine with respect to a potential age discrimination claim. By public disclosure, we meant disclosure to the public at large, not just one member of the public and certainly not to a confidential counselor. U.S. ex rel. John Doe v. John Doe Corp., 960 F.2d 318 (2nd Cir. 1992), reached a similarly untenable result, holding that disclosure of a government investigation of fraud to the employees of the defendant corporation was during their interviews with government investigators a public disclosure within the meaning of the False Claims Act.

Finally, in this regard, we want forcefully to disagree with cases holding that qui tam suits are barred if the relator obtains some, or even all, of the information necessary to prove fraud from publicly available documents, such as those obtained through a Freedom of Information Act (FOIA) request. See ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1520 (9th Cir. 1995), (finding that a public disclosure would occur only if the relator makes a FOIA request and receives the information requested). We believe that a realtor who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a qui tam action. Cases such as U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F. 2d 1149, 1150 (3rd Cir. 1991), which held that a "relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation [,]" undermine Congress' explicit

goals. If, absent the relator's ability to understand a fraudulent scheme, the fraud would go undetected, then we should reward relators who with their talent and energy come forward with allegations and file a qui tam suit.[ii] This is especially true where a relator must piece together facts exposing a fraud from separate documents.

The consequences of these decisions are alarming. Fraud may well go unpunished and, as a practical matter, undetected. Relators, like Ms. Jones, who are fired from their jobs because they blew the whistle on fraud and then take the not unreasonable step of applying for unemployment insurance will be told by their lawyers that their qui tam case is barred. Congress never intended to force relators to choose between filing a qui tam case and providing for themselves and their families.

The Jones case highlights one aspect of the public disclosure bar that has been widely misinterpreted by the courts-the question of what constitutes public disclosure. Unfortunately, other issues involving the public disclosure bar also need to be addressed. A second issue concerns how much information needs to be disclosed in order to constitute a disclosure of "allegations or transactions." On this question, some, but by no means all, of the courts have held appropriately that in order to trigger the bar, the disclosure must include all of the essential elements of the fraud against a specifically identified defendant. As the Eleventh Circuit observed in U.S. ex rel. Cooper v. Blue Cross and Blue Shield, 19 F. 3d 562, 566 (11th Cir. 1994): "Requiring that allegations specific to a particular defendant be publicly disclosed before finding the action potentially barred encourages private citizen involvement and increases the changes that every instance of specific fraud will be revealed. To hold otherwise would preclude

any qui tam suit once widespread-but not universal-fraud in an industry was revealed." See also U.S. ex rel. Lidenthan v. General Dynamics Corp., 61 F. 3d 1402 (9th Cir. 1995) cert. denied 517 U.S. 1104 (1996) (disclosures that make no mention of specific defendant insufficient to invoke bar).[iii]

Not only must the particular defendant be identified, so too must all of the elements necessary to bring a fraud action. As the D.C. Circuit explained in U.S. ex rel Springfield Terminal Ry Co. v. Quinn, 14F.3d 645 (D.C. Cir. 1994), "Congress sought to prohibit qui tam actions only when either the allegation of fraud of the critical elements of the fraudulent transaction themselves were in the public domain." Bits and pieces of information about a defendant and some of its actions-even when publicly disclosed-rarely add up to an allegation of fraud. There must be "enough information * * * in the public domain to expose the fraudulent transaction." U.S. ex rel. Rabushka v. Crane Co., 40 F.3d 1509, 1513-14 (8th Cir. 1994) quoting Springfield, 14 F.3d at 65. To hold otherwise, as some courts have, would undermine the stated purposes of the False Claims Act.

"Embracing too broad a definition of 'transaction' threatens to choke off the efforts of qui tam relators in their capacity as 'private attorneys general.' By allowing [qui tam] complaint[s] to proceed beyond the jurisdictional inquiry, we help ensure that private actions designed to protect the public fisc can proceed in the absence of governmental notice or potential fraud. This is not the type of case that Congress sought to bar, precisely because the publicly disclosed transactions involved do not raise such an inference of fraud."-Id., at 1514.

The last issue we want to raise with respect to public disclosure concern the "original source" exception to the bar. The public disclosure bar applies "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information" 31 U.S.C. s3730(e)(4)(A). Section 3730(e)(4)(B) defines "original source" as a relator with "direct and independent knowledge of the information on which the allegations are based who has voluntarily provided the information to the Government before filing an action under this section which is based on the information." This provision, too, is a source of considerable confusion and controversy in the courts. Again, however, what Congress intended when it drafted the original source exception is easy to discern both from the statute itself and from its legislative history.

First, the language of the statute makes plain that by "original source," Congress meant an original source of information provided to the government and did not, as some courts have held, add an additional requirement that the relator also be the original source of the public disclosure that triggers the bar. See, e.g. U.S. ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2d Cir. 1990); U.S. ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992). There is no statutory nor logical linguistic connection between an original source and the public disclosure that triggers the bar. Of course, a relator could be an original source of the information publicly disclosed, if the relator first provided the information to the Government.

Nor is there any policy rationale that would justify such an interpretation of the original source provision. When Congress enacted the original source provision, we had in mind a scenario where an individual reports fraud to

the government and then there is a subsequent public disclosure of the allegations or transactions before that person has filed a qui tam complaint. The disclosure could be, for example, a criminal indictment brought by the Government as a result of the relator's information. It could also be a press story, based on a leak from a Government investigation or an enterprising reporter's investigative skills. Under these circumstances, the relator would not be barred from bringing a qui tam case. To the contrary, he or she should be rewarded for bringing to the Government information about the fraud.

Defendants have also sought the dismissal of relators by urging that "direct and independent knowledge" somehow requires the relator to be an eyewitness to the fraudulent conduct as it occurs. To the contrary, as the Eleventh Circuit concluded in Cooper v. Blue Shield of Florida, Inc., 19 F.3d 562 (1994) a relator's knowledge of the fraud is "direct and independent" if it results from his or her own efforts. For example, a relator who learns of false claims by gathering and comparing data could have direct and independent knowledge of the fraud, regardless of his or her status as a precipitant witness.

In light of these policies, it should not be surprising that we support emphatically the courts that have held that §3730(e)(4)(B) does not require that the qui tam relator possess direct and independent knowledge of "all of the vital ingredients to a fraudulent transaction." Springfield, 14 F.3d at 656-57. As Representative Berman explained, "A person is an original source if he had some of the information related to the claim which he made available to the government . . . in advance of the false claims being publicly disclosed." 132 Cong. Rec. 29322 (Oct. 7, 1986).

In closing, we want to urge you to consider seriously the Department's obligation to shape the courts' interpretation of the False Claims Act. We are frankly troubled by the fact that the majority of cases confronting the public disclosure bar are cases in which the Department has not intervened and in which there is no reference at all to the Department's views. To us, it appears that the courts take the Department's decision not to intervene in a case as a verdict on the merits of the relator's claims and are using the public disclosure bar in order to dismiss the case quickly. Even if some of those cases should be dismissed on the merits, we cannot countenance a tortured interpretation of the public disclosure bar to reach a desired result. Moreover, if the public disclosure provisions continue to be misinterpreted, relators and their counsel will be deterred from filing truly meritorious claims.

Further, not all of the cases in which the public disclosure bar is raised are those in which the government has declined to intervene. Defendants make public disclosure motions after the government has joined a case, and they do so for only one reason: to deprive the government of the resources that relators and their counsel bring to the case. Yet in those cases, too, the Department is typically silent, refusing to take a position on the public disclosure issue. That stance, too, may well undermine Congress' expressed intent.

One of the principal goals of the 1986 Amendments was to ameliorate the "lack of resources on the part of Federal enforcement agencies." S. Rep. 99-345 at 7. That was one of the reasons we strengthened the qui tam provisions of the law. Thus, we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators

would work together in many cases to achieve a just result. By dismissing relators based on spurious interpretations of the public disclosure bar, the courts are depriving the government of these additional resources. And those resources have been considerable. In numerous cases, relators and their counsel have contributed thousands of hours of their time and talent and spend hundreds of thousands of their own dollars investigating and pursuing their allegations. The Department must act to protect those resources, even in cases where it has not intervened. When a question of statutory interpretation arises, particularly with respect to the public disclosure bar, the Department must make its views known to the court. As we stated emphatically at the time the Amendments were adopted, Congress enacted the Amendments based on the belief that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." We continue to hold that view.

Sincerely,

HOWARD L. BERMAN,
*Member of Congress.*

CHARLES E. GRASSLEY,
*U.S. Senator.*

FOOTNOTES

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[i] The same is true for civil complaints filed in state court or discovery obtained as a result of state court proceedings, which several Circuits have held constitute public disclosures within the meaning of §3720(3)(4)(A). See e.g. U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S.Ct. 2962 (1993) (holding that discovery materials contained in unsealed court records was "publicly disclosed"); U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F2d 1149, 1155-56 (3d Cir. 1991) (holding that the disclosure of discovery material-even if not filed in court-constitutes a public disclosure). We believe those cases are wrongly decided. Disclosure of fraud in a state court proceeding, even a state criminal proceeding, is unlikely to get to the attention of the federal government, unless it is publicized in the news media, a contingency the public disclosure bar addresses.

[ii] Some courts do get it right. In U.S. ex rel. Fallon v. Accudyne Corp., 921 F.Supp. 611 (W.D. Wisc. 1995), the court held that an audit report produced by a state agency did not constitute a public disclosure. "Under these circumstances there is no reason to believe that the United States would become aware of such information." Id., at 625.

[iii] Senator Grassley made a similar comment during the debate on the 1986 Amendments: "The publication of general, non-specific information does not necessarily lead to the discovery of specific, individual fraud which is the target of the *qui tam* action." False Claims Act Implementation: Hearing Before the Subcomm. On Admin. Law and Gov. Relations of the House Comm. On the

Judiciary, 101st cong. 6 (1990) Statement of Senator Grassley.

**APPENDIX G**

# THE 1986 FALSE CLAIMS ACT AMENDMENTS:

# AN ASSESSMENT OF ECONOMIC IMPACT

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# THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT

## EXECUTIVE SUMMARY

This paper examines the economic impact of the 1986 Amendments to the False Claims Act. The impacts examined are: (1) the additional cost savings by the US Government both currently and in the future, and (2) the deterrent effect of the Act's Amendments. To structure some insight into magnitudes of cost savings and deterrence resulting from the 1986 Amendments, the following are developed and analyzed: (1) an estimate of total fraud perpetrated against the US Government; (2) data relating to the number and amount of recoveries under the Act; (3) a theory for identifying the components of deterrence; and (4) a simulation of deterrence using a variety of plausible assumptions.

Among the conclusions reached in this paper are:

1. Total fraud recoveries since the 1986 Amendments can be expected to exceed $24 billion by FY 2006, with $21 billion of that amount coming in the next decade.

2. *Qui tam* recoveries are expected to equal between about $6.9 billion and $9.3 billion over the next ten years.

3. Deterrence of fraud due to the 1986 Amendments for their first ten years of existence (1986-1996) is estimated as between $147.9 billion and $295.8 billion, and for their second ten years of existence (1996-2006) is estimated as between $240.2 billion (23% of the fraud projected to be committed over that period) and $480.3 billion (46% of the fraud projected to be committed over that period), even assuming a conservative estimate of deterrent effect.

4. Deterrence of fraud due to the *qui tam* provisions of the amended Act for their first ten years of existence (1986-1996) is estimated as between $35.6 billion and $71.3 billion, and for their second ten years of existence (1996-2006) is estimated as between $105.1 billion and $210.1 billion, even assuming a conservative estimate of deterrent effect.

# THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT

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The GAO issued a subsequent report in 1981 which examined 21 Federal departments and agencies by obtaining and reviewing records of certain fraud committed within those departments and agencies during the period October 1, 1976 to March 31, 1979.[9] Both the 1978 and 1981 GAO Reports were designed to ferret out management practices, organizational arrangements, and program structures that provided a ready atmosphere for fraud and abuse, and to suggest changes. The Reports were not intended to, nor did they, estimate the amount of fraud that was perpetrated against the Government.

The Department of Justice, however, testifying before the House Appropriations Subcommittee on the Departments of State, Justice and Commerce in 1980, estimated fraud as draining 1 to 10 percent of the entire Federal budget.[10]

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[9] US General Accounting Office, Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?, Volumes 1 and 2, US Government Printing Office, Washington, D.C., May 7, 1981.

[10] Hearings on the Departments of State, Justice and Commerce before the Subcommittee on the Departments of State, Justice and Commerce, the Judiciary and Related Agencies of the House Committee on Appropriations, 96th Congress, 2nd Session, 1980.

*As a basis for assessment, it would seem credible to conclude that total fraud against the government currently equals about 5% of the total Federal budget amount. A more important question, however, is whether fraud is increasing or decreasing and whether or not the False Claims Act as amended is helping to bring about an increase or decrease in fraud.*

Recent studies by the GAO have dealt more with fraud found in specific programs. The GAO has issued several recent studies that have dealt with fraud and waste in Federal health care programs, specifically medicaid and Medicare.

- In 1992, the GAO estimated that, by 1995, fraud and abuse would consume about 10 percent ($100 billion) of the $1 trillion expenditures for the nation's health care.[11]

- A 1995 GAO study noted that: Medicaid accounts for 80 percent of all federal spending on prescription drugs, an amount now equal to over $10 billion. New York State officials estimated that, in 1990, losses to fraud in prescription drugs represented about 10 percent of the state's total Medicaid spending. States

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[11] Lawrence H. Thompson (US General Accounting Office), "Health Insurance: Vulnerable Payers Lose Billions to Fraud and Abuse", Report to the Chairman, Subcommittee on Human Resources and Intergovernmental Operations, US House of Representatives, Washington, DC May, 1992.

have various initiatives under way to curb Medicaid prescription drug diversion but are hampered by insufficient resources, lengthy and frequently unproductive investigations, and the prevalence of repeat offenders and resilient schemes.[12]

- Testimony provided by GAO in 1995 indicated that there were very large savings to be garnered from reducing fraud and abuse in Medicare. Without quantifying the actual loss, but indicating that it is in the realm of billions of dollars, GAO described how providers exploit the system, why they are able to do so, steps already taken, and steps that should be taken to reduce the loss.[13]

- GAO has noted that neither it nor the Congressional Budget Office (CBO) have been able to quantify the savings if states curbed the losses in Medicaid by even a small percentage. But GAO did indicate in 1995 that: "Future Medicaid costs would be reduced substantially [if fraud were eliminated]. However, CBO cannot develop an estimate for this option until specific strategies are identified."[14]

The graph on page 9 illustrates the growth of health care programs as a proportion of the budget into the year 2002,

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[12] Ibid.

[13] US General Accounting Office, "Medicare: Reducing Fraud and Abuse Can Save Billions", Testimony, May 16, 1995 (GAO/T-HEHS-95-157).

[14] Lawrence H. Thompson (US General Accounting Office), loc. cit.

the last year that the Office of Management and Budget (OMB) has projected. While budget outlays are expected to grow over the next five years at rates between 2.5 to 5 percent annually, health care programs are expected to increase their proportion of that budget from 10.3 percent in 1995 to 14.1 percent in 2002 in the case of Medicare; and from 5.9 percent to 7.1 percent in the case of Medicaid over the same period. Social Security outlays are the only other major program payments expected to increase as a proportion of the budget over that period. In general, mandatory programs are expected to maintain a rather constant proportion of the budget, about 69%.

Thus, it is the health and income security components, programs most susceptible to fraud, which are increasing while other elements are diminishing. It is therefore reasonable to expect that fraud perpetrated within the areas of the mandatory programs will produce an increasing share of fraudulent activity in the Federal budget, a good portion of which will be amenable to prosecution under the False Claims Act.

Discretionary elements of the budget, in total maintaining a relatively constant 31 percent of outlays, are themselves remaining relatively constant with only a few exceptions. National Defense outlays, for example, are expected to fall from 18.0 percent of the budget to 14.1 percent of the budget. General science and basic research, housing, and transportation programs - programs also susceptible to fraud - are maintaining their proportion of total budget outlays which now stand at over $12 trillion. Thus, to the extent that fraud in these programs depends on the dollar size of the program, there is little reason to believe that

fraud will (without deterrence) diminish within discretionary expenditures - rather, the growth of certain mandatory programs will increase the amount fraud.

> *If fraud is currently about 5 percent of total outlays, without substantial deterrence it will grow to a higher amount, perhaps 6 percent (to account for the differential growth of health related and other mandatory expenditure programs as discussed above).*

Again, no one knows (or could conceivably know) the full extent of fraud perpetrated against the US Government. The reasoning presented above provides reasonable estimates. It is important to understand that the direction of change is more important than the accuracy of total fraud numbers themselves. In the forthcoming analysis, they serve as a benchmark for analyzing the extent of deterrence and recoveries under the amended False Claims Act.

Using past budget numbers and the budget projections of the OMB, fraud committed (but not necessarily detected) for the years 1986 through 2007 would equal the amounts in the following table if, in fact, fraud were equal to 5 percent of budget outlays adjusted to take into account future growth in programs susceptible to fraud (so that it reaches 6 percent by 2002).

By 2006 fraud itself is growing at about 7 percent annually. This results from the interaction of two growing quantities - the Federal Budget is projected to be growing at rates from 2.5 to 5.10 percent annually in the 1997 to 2006 period at the same time that fraud is assumed to be

increasing its share of the Budget from 5 percent to 6 percent.

* * *

| Fiscal Year | Budget Outlays ($Millions) | Estimated Dollars of Fraud ($Millions) |
|---|---|---|
| 1986 | 990,336 | 49,517 |
| 1987 | 1,003,911 | 50,196 |
| 1988 | 1,064,140 | 53,207 |
| 1989 | 1,143,172 | 57,159 |
| 1990 | 1,252,515 | 62,626 |
| 1991 | 1,323,631 | 66,182 |
| 1992 | 1,380,856 | 69,043 |
| 1993 | 1,408,675 | 70,434 |
| 1994 | 1,460,841 | 73,042 |
| 1995 | 1,519,133 | 75,957 |
| 1996 | 1,572,411 | 78,621 |
| 1997 est. | 1,635,329 | 81,766 |
| 1998 est. | 1,675,877 | 85,470 |
| 1999 est. | 1,716,949 | 89,281 |
| 2000 est. | 1,761,367 | 93,352 |
| 2001 est. | 1,811,531 | 97,823 |
| 2002 est. | 1,868,316 | 102,757 |
| 2003 est. | 1,972,248 | 110,446 |
| 2004 est. | 2,072,832 | 118,151 |
| 2005 est. | 2,178,547 | 126,356 |
| 2006 est. | 2,289,653 | 135,090 |
| 2007 est. | 2,406,425 | 144,385 |

1997-02 estimates by OMB
2003-07 projections of OMB estimates

*Thus, with the assumptions laid out above, total fraud perpetrated (without deterrence) over the ten years since the 1986 Amendments would have amounted to $656.5 billion, and fraud perpetrated against the government in the next ten years would be about $1,040.5 billion - an amount almost equal to the entire Federal Budget in 1988. Without deterrence, by 2006 fraud would be growing at a rate of about 7 percent annually.*

Before deriving broad approximations of total deterrent effects of the 1986 Amendments to the False Claims act it is useful to sketch a theory (framework) for breaking down deterrence into its component parts and then measuring the 1986 Amendments against those components.

* * *

**THE AUTHOR**

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Supreme Court, U.S.
FILED
FEB 7 2000
CLERK

(3)

No. 99-969

IN THE

# Supreme Court of the United States

MISTICK PBT,

*Petitioner,*

*v.*

HOUSING AUTHORITY OF
THE CITY OF PITTSBURGH, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS L.D. ASTORINO AND ASSOCIATES, LTD., LOUIS D. ASTORINO, DENNIS L. ASTORINO, PATRICK I. BRANCH AND BERNARD J. QUINN

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## STATEMENT PURSUANT TO RULE 29.6

Respondent, L.D. Astorino and Associates, Ltd., is a wholly owned subsidiary of LDA-LDA Companies. No publicly held company owns 10% or more of the stock of the respondent or its parent.

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## STATEMENT OF THE CASE

### I. The 1991 State Court Action

Petitioner, Mistick PBT ("Mistick") was the general contractor on two residential housing projects (collectively the "project") owned by Respondent, the Housing Authority of the City of Pittsburgh ("the HACP"). Respondents, Ernest E. Miller and David B. Washington are individual employees of the HACP. Respondent, L. D. Astorino and Associates, Ltd. ("Astorino") was the architect for the project. Respondents, Louis D. Astorino, Dennis L. Astorino, Patrick I. Branch and Bernard J. Quinn are individual employees of Astorino.

In July of 1991, Mistick filed a lawsuit against the HACP in the Court of Common Pleas of Allegheny County, Pennsylvania ("the State Court Action") to recover an alleged increase in the cost of performing the project as a result of a change in the specification for the product to be used as a lead based paint encapsulant from "Glid Wall" to another product known as "Zomat." This change from Glid Wall to Zomat also forms the subject of this action under the False Claims Act. (Joint Appendix, United States Court of Appeals for the Third Circuit ("JA") at A365-A372).

In October of 1994, three (3) years after the State Court Action was commenced, Mistick filed a motion in that action to file an amended complaint including a cause of action against Astorino for fraud. (JA at A174). In support of that motion, Mistick represented to the State Court that it had just, through the course of discovery over the past two months, discovered evidence of which it was previously unaware that would justify asserting a cause of action against

Astorino for fraud. This evidence, according to Mistick, demonstrated as follows:

> (1) that the HACP and Astorino acted in complete and willful disregard of facts in their possession in specifying the use of Glid Wall as a lead based paint encapsulant for the project;
>
> (2) that Astorino knew back in 1988 of warnings regarding the use of Glid Wall as a lead based paint encapsulant; and
>
> (3) that Dennis Astorino and Patrick Branch deliberately disregarded information from the manufacturer of Glid Wall in developing the specification to use Glid Wall as a lead base paint encapsulant.

(JA at A237; A834-A835).

Mistick specifically represented to the State Court that because of the "just recently" discovered evidence of the foregoing allegations, it could not have maintained a cause of action for fraud prior to that time. (JA at A834-A835). Mistick's motion to assert a cause of action against Astorino for fraud was denied by the State Court on or about December 6, 1994 because, among other things, Mistick's allegations against Astorino showed only that the HACP and Astorino failed to exercise reasonable care in preparing the specifications for the lead based paint abatement. (JA at A255-A257).

## II. The 1995 Qui Tam Action

### A. Background

Mistick commenced this qui tam action under the False Claims Act on November 20, 1995. Prior to that, Mistick asserts that it met with the United States and provided the information which allegedly supports the allegations in its qui tam Complaint. After reviewing Mistick's information, the United States declined to intervene in this matter. Since that time, Mistick has prosecuted this action on its own.

The Complaint which Mistick originally filed in the instant qui tam action in November, 1995 ("the original qui tam Complaint") made various allegations that the HACP and Astorino made false claims for payment or reimbursement for extra costs to the United States Department of Housing and Urban Development ("HUD"), which funded a portion of the project. The false claims, according to Mistick, were related to the change from Glid Wall to Zomat as a lead based paint encapsulant on the project. (JA at A013-A150).[1]

The HACP and Astorino each filed Motions to Dismiss the original qui tam Complaint, relying, in part, on the False Claims Act's jurisdictional bar. *See* 31 U.S.C. § 3730(e)(4). Both Defendants asserted that: (1) the original qui tam Complaint was based upon information which was previously publicly disclosed and of which Mistick admittedly first learned in the State Court Action; and (2) that Mistick was not the "original source" of such information. (JA at A161-A403).

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1. Astorino vehemently denies that it submitted any false claims to the United States or otherwise committed any type of fraud against any entity.

Mistick responded to the HACP's and Astorino's Motions to Dismiss by filing a First Amended Complaint ("amended qui tam Complaint") with attached Affidavits of David M. Priselac, Esquire, counsel for Mistick and Thomas Mistick, President, Treasurer and partial owner of Mistick. (JA at A405-A556). Unlike Mistick's representations to the State Court, the Affidavits state that, "Mistick came to believe by the Summer of 1990 that [Astorino and the HACP] in fact had known of the policy concerning Glid Wall all along . . ." (JA at A538; A549).

Astorino and the HACP filed Motions to Dismiss Mistick's amended qui tam Complaint, again relying, in part, on the False Claims Act's jurisdictional bar. *See* 31 U.S.C. § 3730(e)(4). Defendants asserted that: 1) the amended qui tam Complaint was based upon information which was previously publicly disclosed on at least two separate occasions, first in a response to a request under the Freedom of Information Act, 5 U.S.C. § 522, *et seq.*, ("FOIA") in October of 1993, and again in the State Court Action via discovery and various court filings. (JA at A615-A619; A761-A763).

### B. The District Court's Decision

By a Memorandum Opinion and Order, dated March 26, 1997, the United States District Court for the Western District of Pennsylvania held that it lacked subject matter jurisdiction over Mistick's qui tam action under the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). Specifically, the District Court held that there was not only one, but two separate public disclosures of the allegations or transactions upon which the amended qui tam Complaint was based. The first public disclosure occurred when Mistick obtained the information on

which it had allegedly based its amended qui tam Complaint via a FOIA request in October of 1993. The second disclosure was in the State Court Action via discovery and various court filings. (Appendix C, at 79a-81a). In that regard, the District Court specifically determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia*, discovery in the prior state court action and its FOIA request." (Appendix C, at 81a).

The District Court also held that, even assuming Mistick performed its own investigation, it still was not an original source of the information upon which it based its qui tam Complaint because it had neither direct nor independent knowledge thereof. (Appendix C, at 84a). The District Court explained as follows:

> As recognized by the Third Circuit, "[t]he paradigmatic 'original source' is a whistleblowing insider." *Id.* at 1161. This covers "individuals who are close observers or otherwise involved in the fraudulent activity." *Id.* Under the facts of this case, Mistick clearly does not qualify as a "whistleblowing insider."

(Appendix C, at 83a).[2]

---

2. In its Petition, Mistick asserts that, "as a matter of logic, virtually no person other than Mistick would have understood the context in which the [allegedly false] statements were made, known that the statements were false, or even looked for the statements in the first place." Petition for Writ of Certiorari at 4-5. Not only does this statement contravene the District Court's determination that Mistick, under the facts of this case, was not a close observer or otherwise involved in the fraudulent activity, but the record is also

(Cont'd)

Astorino and the HACP also asserted alternative grounds upon which to dismiss the amended qui tam Complaint under Fed. R. Civ. P. 12(b)(6). The District Court did not reach these issues in light of its dismissal of the amended qui tam Complaint under the False Claims Act's jurisdictional bar.

### C. The Third Circuit's Decision

Mistick argued in its appeal to the Third Circuit Court of Appeals that the District Court erred by concluding that: (1) the information disclosed in response to the FOIA request was a "public disclosure" that would trigger the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4); (2) the State Court Action involved the same "allegations" or "transactions" as the instant qui tam action; and (3) Mistick was not an "original source" of the information upon which it based its amended qui tam Complaint. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 382 (3d Cir. 1999) (Appendix A, at 13a).

The majority of the three member panel of the Third Circuit Court of Appeals (the "Third Circuit"), affirmed the District Court and held that the response to the FOIA request was, in fact, a "public disclosure" sufficient to trigger the jurisdictional bar of the False Claims Act. *See id.* at 383

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(Cont'd)
completely devoid of any evidence to support it. Rather, assuming, *arguendo*, that any false statements were made, then the persons who would have been in the best position to understand the context in which the allegedly false statements were made, known that the statements were false, or even looked for such statements would have been the true "whistleblowing insiders," i.e., employees of Astorino and/or the HACP.

(Appendix A, at 13a). In so holding, the Third Circuit relied, in part, on this Court's decision in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). In *GTE*, it was held that the disclosure of information pursuant to the FOIA constitutes a "public disclosure" within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1). *See Mistick*, 186 F.3d at 383 (citing *GTE*, 447 U.S. at 108-09). (Appendix A, at 13a-14a). The Third Circuit further held that the response to the FOIA request occurred within "one or more" of the contexts specified in 31 U.S.C. § 3730(e)(4)(A). Specifically, the Third Circuit held that the [FOIA] response constituted an "administrative . . . report," as well as an "administrative . . . investigation." *Mistick*, 186 F.3d at 383-384 (Appendix A, at 15a-18a).

The Third Circuit also rejected Mistick's "fall back" argument, "that the jurisdictional bar is not triggered, 'because the other essential element, the true state of facts, was not publicly disclosed within the meaning of that provision.' " *Id.* at 385 (Appendix A, at 19a). This argument was rejected primarily because counsel for Mistick conceded at oral argument before the Third Circuit Court of Appeals that all of the essential elements of the alleged qui tam fraud were publicly disclosed in the State Court Action. *See id.* (Appendix A, at 19a-20a).

The Third Circuit then addressed Mistick's only remaining argument that, "although all of the essential elements were revealed in either the FOIA response or in civil discovery, its qui tam action was not 'based on' those public disclosures." *Id.* (Appendix A, at 20a). To that end, Mistick argued that 'based upon,' as used in 31 U.S.C. § 3730(e)(4)(A), should be interpreted to mean "derived from," and, despite its representations to the State Court, its qui tam action was not "derived from," either the information obtained from the FOIA request or the State Court Action.

The Third Circuit rejected this argument as well, instead holding that, "a qui tam action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims." *Id.* at 388 (Appendix A, at 27a). The Third Circuit explained that Mistick's "derived from" interpretation of "based upon," violated the precept that a statute should be construed, if possible, so as not to render any of its terms superfluous. *See id.* at 386 (Appendix A, at 22a-23a). This is exactly what would happen to the "original source" exception to the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(B) under Mistick's "derived from" interpretation of "based upon." *See id.* (Appendix A, at 21a-23a).

Because the essential elements of Mistick's qui tam action were publicly disclosed and Mistick's qui tam action was "based upon" those disclosures, the Third Circuit concluded that Mistick's action was jurisdictionally barred unless it could be saved by the "original source" exception, § 3730(e)(4)(B). *See id.* at 388 (Appendix A, at 26a-27a). The Third Circuit concluded that Mistick was not an original source of the information upon which it based its qui tam Complaint because it had neither direct nor independent knowledge of the allegedly fraudulent statements of the HACP and Astorino. *See id.* at 389 (Appendix A, at 28a). Accordingly, the Third Circuit affirmed the decision of the District Court granting the HACP's and Astorino's Motions to Dismiss for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4).

## REASONS FOR DENYING THE WRIT

### I.

### THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI TO REVIEW THE ISSUE OF WHETHER A DOCUMENT PRODUCED VIA THE FREEDOM OF INFORMATION ACT IS PUBLICLY DISCLOSED UNDER THE FALSE CLAIMS ACT.

The first issue addressed by the Third Circuit, and which is also raised in Mistick's Petition, is whether a FOIA response is a "public disclosure" triggering the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The Third Circuit, following precedent, held that a disclosure of information in response to a FOIA request is a "public disclosure" triggering the jurisdictional bar of the False Claims Act. *See id.* at 382-385. (Appendix A, 13a-18a). This decision is in accord with every other Circuit that has addressed the issue. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *cert. granted, Hughes Aircraft Co. v. United States ex rel. Schumer*, 519 U.S. 926 (1996), *vacated on other grounds*, 520 U.S. 939 (1997) (documents produced in response to a FOIA request are "publicly disclosed" for purposes of the qui tam statute); *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717 (6th Cir. 1999) (documents received pursuant to a FOIA request are considered to be "publicly disclosed" as contemplated by the jurisdictional bar section of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A)).

Petitioner has had ample opportunity to proffer some argument that the "public disclosure" issue meets one of the

tests set forth in Rule 10 of the Supreme Court Rules governing review on certiorari, but has failed to even make such an attempt. *See* Petition for Writ of Certiorari at 24-26. Simply put, Petitioner's Writ focuses on the merits of the argument rather than focusing on the issue at hand: The reasons why this Court should grant certiorari. Indeed, there are no compelling reasons for this Court to review the matter of whether the disclosure of information in response to a FOIA request is a "public disclosure" triggering the jurisdictional bar of the False Claims Act.

## II.

## THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI TO REVIEW THE ISSUE OF WHETHER THE PHRASE "BASED UPON" IN THE JURISDICTIONAL BAR OF THE FALSE CLAIMS ACT SHOULD BE INTERPRETED TO MEAN "SUPPORTED BY" OR "DERIVED FROM."

Mistick's Petition also requests this Court to grant certiorari to review the issue of whether the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A), should be interpreted to mean "supported by" or "derived from." Notably, this Court has refused to grant certiorari on this issue in the past. *See, e.g., United States ex rel. Biddle v. Board of Trustees,* 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); and *United States ex rel. Findley v. FPC - Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997), *cert denied,* 522 U.S. 865 (1997). Mistick's

Petition in this case fails to set forth any novel or compelling reasons as to why this Court should now grant certiorari.[3]

**A. No Conflict Exists Among The Circuits That Requires Resolution At This Time.**

Mistick argues that certiorari is appropriate because there is a split in the Circuits regarding the interpretation of the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A). To support this argument, Mistick cites the following cases which interpret "based upon" in 31 U.S.C. § 3730(e)(4)(A) to mean "derived from," contrary to eight other circuits which have interpreted it to mean "supported by": *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994); *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999); and *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). These cases, however, present a conflict far less acute than what Mistick's Petition suggests and which does not require resolution at this time.

Initially, the First Circuit's decision in *United States ex rel. LeBlanc v. Raytheon Co., Inc., supra*, cannot be taken into account in establishing a split in the Circuits because the Court

3. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, 120 S. Ct. 523 (1999), the parties were directed, "to file supplemental briefs addressing the following question: 'Does a private person have standing under Article III to litigate claims of fraud upon the government?' " Accordingly, if this Court decides in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, that a private person does not have standing to bring an action under Article III to litigate claims of fraud upon the government, then the issues raised in Mistick's Petition will be rendered moot. Mistick's Petition should be denied on this basis alone.

did not write an opinion. Rather, the Court summarily affirmed the district court, without any discussion. *See id.* Moreover, neither the Seventh Circuit in *United States v. Bank of Farmington, supra,* nor the district court in *LeBlanc, supra,* found it necessary to even make a decision as to whether "based upon" should be interpreted to mean "supported by," or "derived from." Instead, in both of those cases, the courts ultimately stated that under either interpretation, the qui tam complaint was "based upon" the publicly disclosed information. *Bank of Farmington,* 166 F.3d at 867; *LeBlanc v. Raytheon Co., Inc.*, 874 F. Supp. 35, 40 (D. Mass. 1995), *aff'd,* 62 F.3d 1411 (1st Cir. 1995), *cert. denied,* 516 U.S. 1140 (1996).

Most significant, however, is the fact that none of the three cases cited by Mistick to establish a split in the Circuits even acknowledge, let alone address, the issue of whether interpreting "based upon" to mean "derived from," in the context of 31 U.S.C. § 3730(e)(4)(A) renders the "original source" exception largely superfluous. On the other hand, all eight circuits that have addressed this issue to date, including the Third Circuit in this matter, have interpreted "based upon" in § 3730(e)(4)(A) to mean "supported by," as opposed to Mistick's "derived from" interpretation. *See United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992); *Mistick*, 186 F.3d at 387; *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *McKenzie*, 123 F.3d at 940; *Biddle*, 161 F.3d at 537; *United States Ex Rel. v. M. K. Ferguson*, 99 F.3d 1538 (10th Cir. 1996); *Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994); *Findley*, 105 F.3d at 682-83.

### 1. The Third Circuit Properly Rejected Mistick's "Derived From" Interpretation of "Based Upon" in 31 U.S.C. § 3730(e)(4)(A).

One of the primary reasons all of the foregoing Circuits, including the Third Circuit, have been compelled to reject Mistick's "derived from" interpretation of "*based upon*" in 31 U.S.C. § 3730(e)(4)(A) and adopt the "supported by" interpretation is because the "derived from" interpretation renders the original source provision set forth in 31 U.S.C. §§ 3730(e)(4)(A) and (B) redundant and largely superfluous. Thus, "*based upon*" cannot be interpreted to mean "derived from" as Mistick argues because such an interpretation would directly violate this Court's maxim of statutory construction that a statute should not be interpreted so as to render superfluous other provisions in the same enactment. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877 (1991) (noting that, "our cases consistently have expressed, 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.' ")

The District of Columbia Circuit Court of Appeals aptly summarized this conclusion as follows:

> Why, one may ask, assuming the Fourth Circuit test of "based upon" as meaning "derived from," would Congress provide an exception in the case of a relator who has actually derived his complaint from public information, that allows him to demonstrate that he already provided his independently obtained knowledge to the government before he filed suit? Such a test strains the meaning of the word independent to encompass a relator who, after reading about a fraudulent transaction in The Washington Post or The Washington Times,

> conducts an "independent" investigation to obtain direct knowledge of the fraud and beats the government to the courthouse. Such relator could fulfill the "original source" governmental notice requirement by delivering a courtesy copy of a proposed complaint outlining the same information that is in the public domain to the Attorney General the day before filing the official Complaint under seal and serving it on the Attorney General. Thus, under the Fourth Circuit's interpretation, the primary "based upon" test swallows the original source exception whole. Using "based upon" as a proxy for whether the relator's complaint merely parrots what is already in the public domain, on the other hand, leads logically to a subsidiary inquiry into whether the relator had obtained the information in his complaint independently prior to the disclosure and so is an "original source."

*Findley*, 105 F.3d at 683.[4]

Mistick's Petition incorrectly asserts that "[b]y interpreting the phrase 'based upon' in § 3730(e)(4)(A) to

4. Mistick's "derived from" interpretation of "based upon" in 31 U.S.C. § 3730(e)(4)(A) would also allow a relator to avoid the second requirement of the "original source" provision that the information upon which the qui tam complaint is based be provided to the United States Government prior to bringing the action. *See Salcido, Screening Out Unworthy Whistleblower Actions: A Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB CONTRACTS L.J. 237 (1995) (stating that: "[the "derived from"] construction would in effect strike the statutory requirement that the relator 'voluntarily' provide his evidence to the Government prior to filing because the relator would only need to prove that he had information 'independent' of the public disclosure and therefore his complaint is not 'based upon' the public disclosure.")

mean 'substantially similar to,' or 'supported by,' rather than according to its admitted plain meaning of 'derived from,' the panel majority interprets § 3730(e)(4)(A) as a bar to meritorious *qui tam* suits generated from the relator's original and independent knowledge." Petition for Writ of Certiorari at 9. This is clearly not the effect of the Third Circuit's holding. Most significantly, it fails to recognize that under the Third Circuit's holding, a relator may still bring an action under the False Claims Act, even if it is "based upon" publicly disclosed information, if the relator is an original source, i.e., has "direct and independent knowledge of such information." *Mistick*, 186 F.3d at 389 (Appendix A, at 27a). However, the Third Circuit, as well as the District Court, held that Mistick did not have direct and independent knowledge of the information upon which it based its qui tam Complaint. *See id.* at 389 (Appendix A, at 28a; Appendix C, at 85a).

In conclusion, the Third Circuit correctly held in this case that "based upon" in § 3730(e)(4)(A) must be interpreted to mean "supported by." This holding is consistent with all the Circuits that have addressed the issue of whether Mistick's "derived from" interpretation renders the "original source" exception to the jurisdictional bar of the False Claims Act superfluous. As such, there is no conflict among the Circuits that would require resolution at this time.

### 2. Mistick's Attempt To Create A Scenario In Which Its "Derived From" Interpretation Would Not Render The "Original Source" Exception To The Jurisdictional Bar Of The False Claims Act Superfluous Must Fail.

Mistick goes to great lengths in an attempt to create two scenarios in which its "derived from" interpretation of "based upon" would not render the "original source" exception to the False Claims Act's jurisdictional bar superfluous. Significantly, not a single Circuit Court has embraced either of these scenarios.

Under the first scenario, Mistick suggests that, "the 'original source' provision may be a mere safe harbor, useful whenever a relator could more easily prove itself an 'original source' than disprove a causal link between the public disclosures and the qui tam action." Petition for Writ of Certiorari at 22. As pointed out by the Third Circuit, however, even if there were no "original source" exception, a relator could still prove that his information was not derived from a public disclosure by showing that he was an original source of the information. Thus, this argument fails to explain why Congress would have adopted the "original source" exception if the phrase "based upon" in 31 U.S.C. § 3730(e)(4)(A) meant "derived from." *Mistick*, 186 F.3d at 387. (Appendix A, at 23a).

Mistick also suggests that, "[w]hen it is realized that the phrase 'based upon' in § 3730(e)(4)(A) could mean 'actually derived in part from' the supposed superfluousness of § 3730(e)(4)(B)'s original source provision vanishes." Petition for Writ of Certiorari at 23. Significantly, this explanation requires an even greater deviation from the plain language of 31 U.S.C. § 3730(a)(4)(A) than what Mistick

accuses the Third Circuit of in holding that "based upon" in § 3730(a)(4)(A) must be interpreted to mean "supported by," as opposed to "derived from." Indeed, neither Mistick nor, as pointed out by the Third Circuit, Judge Becker in his dissent, attempts to explain how this interpretation can be made to fit the language of 31 U.S.C. §§ 3730(e)(4)(A) and (B). *See id.* (Appendix A, at 23a).

In any event, even taking into consideration Mistick's scenarios, the fact remains that a "derived from" interpretation of the phrase "based upon" renders the original source exception in 31 U.S.C. § 3730(e)(4)(A) and § 3730(e)(4)(B) largely superfluous. In light of the foregoing, Mistick's attempt to create a scenario in which its "derived from" interpretation of "based upon" does not render the original source exception superfluous must fail and does not present a meritorious reason to grant its Petition.

**B. The Facts Of This Case Do Not Warrant A Grant Of Certiorari.**

Mistick's Petition is founded, in large part, on its position that "based upon" in 31 U.S.C. § 3730(e)(4)(A) should be interpreted to mean "derived from," as opposed to "supported by." *See* Petition for Writ of Certiorari at 9. However, Mistick's Petition overlooks the fact that the District Court already determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia,* discovery in the prior state court action and the FOIA." (Appendix C, at 81a). In fact, the Third Circuit also held that Mistick learned of the

allegedly fraudulent statements through a public disclosure. *See Mistick*, 186 F.3d at 389. (Appendix A, at 28a).[5]

---

5. Mistick's Petition erroneously asserts that, "[u]nder Chief Judge Becker's view, the action was not barred because, among other reasons, it was not 'derived from' publicly disclosed information." Petition for Writ of Certiorari at 6. Contrary to Mistick's assertions, Judge Becker stated in his dissent that he would have remanded the case to the District Court to determine whether the allegations in Mistick's Complaint were "derived from" the public disclosures. *Mistick*, 186 F.3d at 402 (Appendix A, at 61a). However, Judge Becker failed to recognize that the District Court had already determined that, "[Mistick] acknowledges that it gained some of the information upon which it based the within qui tam action through both civil and administrative processes, including, *inter alia*, discovery in the prior state court action and its FOIA request." (Appendix C, at 81a).

Mistick's Petition also erroneously asserts that,

> the panel majority recognized that Mistick knew both the true and misrepresented facts independently, well before publication of the same in the Mistick State Action. Mistick's original and independent knowledge was gained, as to the true set of facts, primarily as a result of Mistick's performance of its general contracting work on the Bedford and Addison projects.

Petition for Writ of Certiorari at 7. Indeed, absolutely nowhere in its majority opinion does the Third Circuit determine, as a matter of fact, that Mistick gained its knowledge of the "true set of facts," as a result of its performance of its general contracting work on the project. To the contrary, the Third Circuit utilized such phrases as, "[a]ccording to Mistick's Complaint," or "[a]ccording to the affidavit of D. Thomas Mistick," to qualify any statements regarding what Mistick terms, "the true set of facts." *See Mistick*, 186 F.3d at 379 (Appendix A, at 4a-6a).

Accordingly, the result in this matter, i.e., a finding that Mistick's action was "based upon" a public disclosure would not change regardless of whether the "based upon" language in 31 U.S.C. § 3730(e)(4)(A) is interpreted to mean "derived from" or "supported by." Any resolution of the "derived from" versus "supported by" issue should, therefore, await a case in which it is determined that the relator, unlike Mistick in this case, obtained the information upon which the qui tam action was based independently of any public disclosure, yet was still precluded from bringing the action under the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4).

### C. If, As Mistick Argues, The Circuit Courts' Interpretation Of The Jurisdictional Bar Is Inconsistent With Legislative Intent, Then Congress Can And Will Amend The Statute.

In support of its Petition, Mistick relies, to a large extent, on a letter authored by Senator Charles E. Grassley and Congressman Howard L. Berman to Janet Reno, Attorney General, 145 Cong. Rec. E1540-01, E1546-01 (July 14, 1999) (the "Grassley/Berman letter"), thirteen years after the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4) was last amended in 1986. Mistick's reliance on the Grassley/Berman letter to bolster its Petition, however, is of no moment. This Court has consistently held that, "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage . . . Such statements 'represent only the personal views of these legislators, since the statements were (made) after passage of the Act.' " *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 132 (1974) (citations omitted). Indeed, "[T]he views of a legislature concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed . . . arguments based on

subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia J., concurring in part). As such, the opinions asserted in the Grassley/Berman letter should not be considered for the purposes of interpreting the jurisdictional bar of the False Claims Act.[6]

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6. Notwithstanding the representations set forth in the Grassley/Berman letter thirteen (13) years after the 1986 amendments to the False Claims Act, the Third Circuit noted that its decision in this case was, in fact, consistent with the description of the amendments which Senator Grassley and Representative Berman offered in 1986 and explained as follows:

> Although we do not rely on the legislative history of the qui tam provision in reaching this conclusion, *see Stinson*, 944 F.2d at 1154, it is interesting that sponsors of the 1986 False Claim Act Amendments described it as having a meaning consistent with our holding. Senator Grassley, one of original Senate sponsors, in speaking of the technical and clarifying amendments that introduced the present language in § 3730(e)(4)(A), stated:
>
> [J]urisdiction for qui tam actions based on information that has been publicly disclosed will be limited to those people who were "original sources" of the information. . . . 132 Cong. Rec. S11238-04 (Aug. 11, 1986) (emphasis added). Similarly, Representative Berman, one of the sponsors of the House bill, submitted "legislative history" that stated in relevant part:
>
> Before the relevant information regarding fraud is publicly disclosed through various government hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long

(Cont'd)

Significantly, however, the Grassley/Berman letter is relevant to the instant matter to the extent that it demonstrates Congress' knowledge of the Circuit Courts' interpretation of the jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4). If, as Mistick argues, Congress is discontented with the past and current interpretation of the jurisdictional bar which the Circuit Courts have been compelled to apply, then Congress can and will amend the statute. In the meantime, the courts are bound to follow the tenets of statutory construction which this Court has established in interpreting the jurisdictional bar.

### D. Mistick's Argument That The Third Circuit's Decision Conflicts With Decisions Of This Court Is Incorrect.

Mistick's Petition asserts that the Third Circuit's decision in this case, and the decision of at least seven other Circuit Courts, is inconsistent with decisions of this Court. In making such an argument, Mistick cites to general principles of statutory construction opposite to its position. Mistick fails, however, to address the basic tenets of this Court which compel the Circuit Courts to interpret "based upon" in 31 U.S.C. § 3730(e)(4)(A) to mean "supported by," and not "derived from."

Initially, Mistick cites this Court's decisions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) and *United States v. Neifert-White Co.*, 390 U.S. 228 (1968) for the

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(Cont'd)

> as it is filed before the government filed an action based upon the same information. Once, the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action. 132 Cong. Rec. H9382-03 (Oct. 7, 1986) (emphasis added).

*Mistick*, 186 F.3d at 388, n.9 (Appendix A, at 26a-27a).

proposition that "[t]his Court has warned against unduly restrictive interpretations of the *qui tam* provisions of the Act, in light of the clear historical Congressional intent to employ such actions as part of the United States' anti-fraud efforts." Petition for Writ of Certiorari at 18-19. Significantly, unlike the instant matter which centers on the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A), of the current version of the False Claims Act, *Marcus* and *Neifert-White Co.*, involve a prior version of the False Claims Act and do not involve the issue of the Federal Courts' subject matter jurisdiction.

Mistick's Petition also asserts that the Third Circuit's decision in this matter is inconsistent with this Court's decisions holding that a statute must be interpreted according to the plain meaning of the terms chosen by Congress, notwithstanding the fact that a statute is poorly or inartfully drafted. In support of this argument, Mistick cites the following cases: *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. James*, 478 U.S. 597, 604 (1986); *Rubin v. United States*, 449 U.S. 424, 429-430 (1981); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989); *Office of Workers' Compensation Program v. Rasmussen*, 440 U.S. 29, 45-47 (1979); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Mistick does not, however, acknowledge any of the decisions of this Court which unequivocally express, "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552,

562 (1990). This basic tenet of statutory construction must be invoked, even if the plain language of a statute is unambiguous. *See, e.g., United States v. Correl*, 389 U.S. 299 (1967).

Moreover, except for one, none of the cases cited by Mistick involves the issue of whether a particular interpretation of a statute renders another part of the statute superfluous. Significantly, in the only case wherein the issue was raised, *Connecticut Nat'l Bank v. Germain, supra*, this Court reaffirmed the rule that, "a court should disfavor interpretations of statutes that render language superfluous." 503 U.S. at 253. In that case, however, the Court determined that no part of the statute was rendered superfluous under the plain language of the statute, unlike in this case where Mistick's "derived from" interpretation of "based upon" renders the "original source" exception superfluous. Thus, the Third Circuit's decision in this matter is entirely consistent with the weight of precedent and the decisions of this Court.

**E. The Decisions Of This Court Addressing The Phrase "Based Upon" In Other Federal Law Contexts Supports The Third Circuit's Decision In This Case.**

Mistick's Petition asserts that this Court, in other opinions, has favored the type of "derived from" meaning rejected by the Third Circuit and in support of this argument cites *United States v. Wade*, 388 U.S. 218, 240 (1967) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). *See* Petition for Writ of Certiorari at 20-21. Neither case, however, supports Mistick's position. The meaning of the phrase "based upon" was not at issue in *Wade*. Furthermore, in *Saudi Arabia v. Nelson*, this Court's definition of the phrase "based

upon" actually supports the Third Circuit's interpretation. In *Saudi Arabia*, this Court held that, "the phrase [based upon] is read most naturally to mean those elements of a claim that, if proven, would entitle Plaintiff to relief under his theory of the case." *Saudi Arabia*, 507 U.S. at 357. Contrary to Mistick's assertion, this supports, and in fact, is substantially similar to the Third Circuit's holding that, "a qui tam action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the qui tam action or all of the essential elements of the qui tam action's claims." *Mistick*, 186 F.3d at 388 (Appendix A, at 27a).

## III.

## THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI REGARDING THE THIRD CIRCUIT'S HOLDING THAT MISTICK IS NOT AN "ORIGINAL SOURCE" OF THE INFORMATION UPON WHICH IT BASED ITS COMPLAINT.

Mistick's Petition frames the third issue upon which it seeks a Writ of Certiorari as, "[w]hether a person is disqualified from being an 'original source' under 31 U.S.C. § 3730(e)(4)(B) when that person's *qui tam* suit is 'based upon' fraudulent transactions that were publicly disclosed as a result of that person's efforts." Petition for Writ of Certiorari at 1. The issue, however, as framed by Mistick, mischaracterizes what the Third Circuit actually held with respect to the "original source" exception.

Relying upon its prior holding in *United States ex rel. Stinson, Lyons, Gerlin and Bustamante P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1990), the Third

Circuit held that, "[a] relator who would have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of original source." *Mistick*, 186 F.3d at 389 (Appendix A, at 28a). The Third Circuit then explained that Mistick was,

> not an "original source" because it did not have "direct and independent knowledge" of the most critical element of its claim, viz., that the Authority had made the alleged misrepresentations to HUD regarding its knowledge about Glidwall's unsuitability as a lead based paint encapsulant at the time of the original specification.

*Id.* at 388-389 (Appendix A, at 28a).

Contrary to the assertions in Mistick's Petition, the Third Circuit's holding that Mistick is not an "original source" is entirely consistent with its prior holding in *Stinson*. It also does not, as Mistick argues, somehow render either paragraph (A) or (B) of 31 U.S.C. § 3730(a)(4) superfluous. The Third Circuit simply recognized, and common sense dictates, that a person who would not have learned of information absent a public disclosure, does not have independent knowledge thereof. *See id.* (Appendix A, at 27a-28a).

Mistick's petition also incorrectly states that in *United States ex rel. Newsham v. Lockheed Missles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), the Ninth Circuit "specifically" held that a relator still qualifies as an original source when the relator itself caused the supposed "public disclosure." Petition for Writ of Certiorari at 28. To the contrary, in *Newsham*, the Ninth Circuit held, like the Third Circuit in *Stinson* and this case, that an "original source" must have both direct and independent

knowledge of the information on which the allegations in the qui tam Complaint are based. The Ninth Circuit, however, imposed an additional requirement that the relator also have, "a hand in the public disclosure of the allegations." *Newsham*, 190 F.3d at 970 (citing *U.S. ex rel. Lujan v. Hughes Aircraft Company*, 162 F.3d 1027, 1033 (9th Cir. 1998)). The Ninth Circuit did not, as Mistick suggests, hold that a relator who causes a public disclosure, in any event, qualifies as an "original source."

Finally, Mistick's petition incorrectly asserts that the Third Circuit ignored, "that Mistick itself brought respondent's false statements to light through the Priselac FOIA request, and that the United States did not know those statements to be false until Mistick explained the circumstances . . .". Petition for Writ of Certiorari at 28. To the contrary, there is absolutely no evidence in the record that Mistick brought any "false statements" to light through its FOIA request or that it informed the United States of anything of which it was not previously aware.

In conclusion, Mistick has failed to identify a conflict among the Circuits or any other compelling reason as to why this Court should grant certiorari to review the Third Circuit's determination that Mistick was not an "original source" of the information upon which it based its complaint in this matter.

## CONCLUSION

For all the foregoing reasons, Mistick's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

MISTICK PBT,

*Petitioner,*

*v.*

HOUSING AUTHORITY OF
THE CITY OF PITTSBURGH, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR HOUSING AUTHORITY PARTY RESPONDENTS

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## COUNTERSTATEMENT OF THE CASE

This *qui tam* action is the second attempt by Mistick PBT (Mistick), a general contractor, to recover from the Housing Authority of the City of Pittsburgh (HACP) in connection with the change in specifications for lead based paint abatement at two residential housing projects known as the Bedford and Addison projects. The District Court thwarted that attempt when it granted the motions to dismiss based upon the jurisdictional bar in the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

The first action was commenced on July 16, 1991 by the filing of a complaint against HACP in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. G.D. 91-12543. That complaint sought damages for delay resulting from the change in specifications for encapsulating the lead based paint at the Bedford and Addison projects. During that action, Mistick discovered evidence which allegedly substantiated claims for fraud against HACP and its architects in connection with the specification for the lead-based paint abatement and, thus, Mistick sought leave to amend its state court complaint to include claims against the architects for fraud.[1] The state court denied that motion on December 6, 1994, and, in doing so, it ruled that Mistick's allegations showed nothing more than purported negligence

---

1. The representations made by Mistick to the state court regarding the source of its knowledge (discovery) and the time of its acquisition (August to October 1994) contradicted those subsequently made by Mistick to the District Court. Affidavits filed in the District Court alleged that Mistick knew of the fraud since October 1993 and that it acquired its knowledge, in part, from documents obtained pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (FOIA).

in preparing the specifications. Thereafter, Mistick and HACP negotiated a settlement. In the settlement agreement and release, signed on August 1, 1996, Mistick agreed, in consideration of a substantial payment by HACP, to release HACP and its employees from:

> any and all causes of action, claims and/or demands for damages, losses, costs, expenses, compensation, proceeds, fees and/or monies, known and unknown, which Mistick PBT has made, claims to have and/or may hereafter have or claim to have . . . , including particularly, without limitation, any and all sums owed or claimed to be owed to Mistick PBT for losses or damages incurred or claimed to have been incurred by Mistick PBT arising from the performance of the Bedford Dwellings remodeling and reconstruction contract . . . and/ or the performance of the Addison Terrace remodeling and reconstruction contract.

The state court action was marked settled and discontinued on August 5, 1996.

Unbeknownst to HACP, Mistick commenced the second action, in the District Court, on November 20, 1995. That action was brought under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and, in compliance with that act, the complaint was kept under seal and it was not immediately served upon the defendants. On July 8, 1996, the United States filed its notice of election to decline intervention. The next day, the District Court lifted the seal on the complaint and certain other items and it directed Mistick to serve the complaint and various other documents. Mistick did not

request the issuance of summonses until August 6, 1996, *the day after the state court action was marked settled and discontinued*. It made service on all parties except Mr. Washington shortly thereafter.

The *qui tam* complaint — kept under wraps while the state court case was winding down to settlement — avers that HACP parties[2] and the architectural parties defrauded the federal government by making false representations regarding the suitability of a particular product, Glid Wall, as an encapsulant for the lead based paint and the reasons for the change to another product, Zomat, for the actual lead-based paint abatement undertaken by Mistick at the federally-funded Bedford and Addison projects.

The respondents filed motions to dismiss which were renewed after Mistick amended its *qui tam* complaint. All of the respondents asserted that the District Court lacked subject matter jurisdiction because the *qui tam* action was based upon public disclosures and the relator, Mistick, was not an original source of that information. In addition, HACP parties moved to dismiss the *qui tam* complaint for failure to state a cause of action, in that the claims were barred by the following:

1. the doctrine of res judicata;

2. the express terms of the release executed between plaintiff and HACP settling and terminating prior litigation involving the identical occurrences and subject matter as made the basis of the instant litigation;

---

2. HACP parties refers to the Housing Authority of the City of Pittsburgh and its agents, Messrs. Miller and Washington.

3. the statute of limitations at 31 U.S.C. § 3731; and

4. the patent absence of a knowingly false or fraudulent claim for payment.

The District Court agreed that it lacked subject matter jurisdiction and, thus, it dismissed the complaint and the amended complaint. It did not address any of the alternative grounds for dismissal urged by HACP parties. The United States Court of Appeals for the Third Circuit affirmed. It, too, declined to reach any of the alternative grounds for affirmance raised by HACP parties.

## COUNTERSTATEMENT OF THE FACTS

HACP, a federally subsidized public housing authority, owns a number of residential housing projects, including the Bedford Dwellings and Addison Terrace. It engaged the Astorino parties to serve as architects and consultants for renovations and improvements at those projects. This engagement included the development of specifications for abatement of lead paint hazards at the projects. Mistick was awarded the contract to perform the renovations and improvements, including the necessary lead based paint abatement.

The specifications for the lead based paint abatement work permitted the contractor performing this work to use one of two encapsulants, one called Glid Wall and the other called Pentagon Plastics. When Mistick submitted its bid to perform this work as general contractor, it voluntarily selected Glid Wall. The bids were accepted by HACP and contracts were awarded and executed in September 1989.

Afterwards, a multi-faceted dispute arose about the Glid Wall specification. One aspect of this dispute was that the manufacturer of Glid Wall allegedly no longer recommended or sold Glid Wall for the specific use of lead abatement, although at one time Glid Wall was used and promoted for lead abatement by the manufacturer and it still was being used for that purpose by one other public housing authority. A second facet of the controversy surrounding the Glid Wall specification was that Mistick substantially underbid the cost of performing the Glid Wall work. The bid was incorrectly calculated on the basis that one gallon covered four hundred square feet, although one gallon was specified to cover only one hundred square feet. Facing a substantial financial loss if required to apply Glid Wall in compliance with the correct coverage rate, Mistick insisted that the specification be changed to a different wall covering or that Mistick be granted other relief from its expensive bid error. But for its underpriced bid, Mistick undeniably stood ready to apply Glid Wall.

In mid-March 1990, before Mistick applied any Glid Wall, the architect changed the lead abatement specification from Glid Wall to Zomat. Therefore, instead of Glid Wall being used, the lead abatement work at the projects used Zomat. For a variety of reasons, Zomat was more expensive than Glid Wall. Consequently, the cost of the required abatement work increased by approximately $751,000. In connection with this increased cost, HACP in January 1992 submitted to HUD a change order seeking compensation for approximately $250,000 of this cost. Ultimately, HACP allegedly paid for the remainder with funds provided by HUD through the annual budget process.

The gist of this claim under the False Claims Act was that the architect issued and HACP approved the Glid Wall specification with knowledge that it was erroneous which, in turn, prevented the application of Glid Wall and required the specification to be changed to Zomat, thereby increasing the cost of the renovation work. To pay for the lead abatement work and this increased cost, HACP allegedly made false or fraudulent claims for HUD funds. These allegedly false or fraudulent requests for payment constitute a violation of the False Claims Act *according to Mistick*.[3]

The District Court held that it lacked subject matter jurisdiction under the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A). The District Court found that there were *two* separate public disclosures of the allegations or transactions upon which the *qui tam* complaint was based. One such disclosure occurred in October of 1993 when Mistick acquired information pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (FOIA). The second disclosure involved the discovery and state court filings relating to its attempt to plead fraud claims based upon the change in the lead-based paint abatement specification. The District Court noted that Mistick acknowledged that it gained some of the information upon which it based the *qui tam* action through both civil and administrative processes. The District Court held that these public disclosures triggered the jurisdictional bar. The District Court also held that Mistick could not proceed, in light of the public disclosures, because it was not an original source of the information upon which it based the *qui tam*

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3. HACP parties dispute the contention by Mistick that they made a false or fraudulent claim. The lower courts did not reach that issue.

complaint. The District Court found that Mistick neither had direct nor independent knowledge of the facts. Rather, the District Court held, Mistick admittedly became aware of the allegedly fraudulent behavior via the intervening agency, instrumentality or influence of the FOIA request and the state court proceedings.

A divided panel of the Third Circuit affirmed in all respects. The panel majority held that the FOIA request and the state court discovery constituted public disclosures within the ambit of the jurisdictional bar. With respect to the FOIA request, the majority relied upon a substantial body of law from other jurisdictions[4] and an analogous Supreme Court case,[5] as well as the plain language of the False Claims Act itself.[6] As to the discovery issue, the panel followed prior Third Circuit precedent.[7] In so holding, the majority relied

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4. *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*,186 F.3d 376, 384-85 (3d Cir. 1999), *citing United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 979 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999); *United States ex rel. Burns v. A.D. Roe Co.*, 919 F. Supp. 255, 257 (W.D. Ky. 1996); *United States ex rel. Herbert v. National Academy of Sciences*, 1992 WL 247587, at *6 (D.D.C. September 15, 1992).

5. *Mistick*, 186 F.3d at 383, *citing Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980).

6. *Mistick*, 186 F.3d at 383, *citing* 31 U.S.C. § 3730(e)(4)(A).

7. *Mistick*, 186 F.3d at 385, *citing United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991).

upon Mistick's concession, made at oral argument, that all of the essential elements of the alleged fraud were publicly disclosed in the state court action.[8] In that regard, this Honorable Court must consider the filings in state court as well as the discovery. Mistick alleged, in its motion for leave to amend its complaint, that "recent" discovery substantiated its averments, all of which were spelled out in great detail in the proposed amended complaint which was appended to the motion. The majority rejected Mistick's argument that its *qui tam* complaint was not based upon those public disclosures because it was not derived from publicly disclosed information. The majority acknowledged the Fourth Circuit decision underlying Mistick's argument,[9] but it ultimately sided with the vast majority of circuits which have addressed this question.[10] Thus, the majority held that the federal complaint was based upon the information gleaned through FOIA and the state court action because the *qui tam* averments were set forth in the public

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8. *Mistick*, 186 F.3d at 385.

9. *Id.* at 385-86, *citing United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928, 115 S. Ct. 316, 130 L. Ed. 2d 278 (1994).

10. *Mistick*, 186 F.3d. at 387, *citing United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Junior University*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1457, 143 L. Ed. 2d 543 (1999); *United States ex rel. Findley v. F.P.C. Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S. Ct. 1364, 122 L. Ed. 2d 742 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992).

disclosures.[11] Finally, the majority held that Mistick could not save its claim from the jurisdictional bar because it was not the original source of the publicly disclosed information.[12] The majority cited the information obtained through the FOIA request as an example of the fact that Mistick was not the original source of information essential to its complaint.[13]

The dissenting opinion, doubtlessly the blueprint for Mistick's petition, took issue with the majority's holdings on both aspects of the public disclosure issue. According to the dissent, information developed through FOIA is not publicly disclosed and neither is that which is revealed in discovery.[14] Perhaps more importantly, though, the dissent disagreed with the majority's interpretation of the based upon requirement of the jurisdictional bar.[15] The dissent would have held that the Fourth Circuit's approach was correct: based upon means derived from, not supported by or similar to.[16] Thus, the dissent would have remanded for further proceedings to determine whether the *qui tam* allegations were derived from any publicly disclosed information.[17] As such, the dissent would not have reached the original source issue.[18]

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11. *Mistick*, 186 F.3d at 387.

12. *Id.* at 389.

13. *Id.*

14. *Id.*, 186 F.3d at 390-94 (Becker, C.J., dissenting).

15. *Id.* at 394 (Becker, C.J., dissenting).

16. *Id.* at 186 F.3d at 395, 402 (Becker, C.J., dissenting).

17. *Id.* at 402-03 (Becker, C.J., dissenting).

18. *Id.* at 402 (Becker, C.J., dissenting).

## REASONS FOR DENYING THE WRIT

### I.

### THE PETITION SHOULD BE DENIED BECAUSE THE STATUTORY INTERPRETATION QUESTIONS RAISED IN THE PETITION PRESENT NO COMPELLING REASONS TO GRANT CERTIORARI.

In its petition, Mistick seeks review of several questions of statutory interpretation arising under the False Claims Act. The Astorino parties have ably demonstrated, in their opposing brief, that there are no compelling reasons to grant certiorari, as required by Supreme Court Rule 10. Further, they have identified and addressed key misstatements contained in the petition. The HACP parties join in and adopt the brief in opposition filed on behalf of the Astorino parties.

### II.

### THE PETITION SHOULD BE DENIED BECAUSE THE UNIQUE STATUS OF PRINCIPAL PARTIES MAKES THIS AN UNSUITABLE CASE TO REVIEW ANY ISSUES ARISING UNDER THE FALSE CLAIMS ACT.

Because of the unique facts of this case, it is an inappropriate vehicle to review any questions arising under the False Claims Act. Specifically, the status of HACP as a federally subsidized public housing authority makes this an unsuitable case to review. Further, the fact that Mistick already benefited from the change in the specifications for a lead based paint abatement product should preclude review.

HACP receives a substantial portion of its funding from the United States Department of Housing and Urban Development (HUD). If this Honorable Court were to grant Mistick any relief, HACP would suffer great financial hardship, thereby increasing its need for federal funding. Congress did not intend the False Claims Act to be a procedure for the federal government to take money from its left pocket to be put into its right one minus, of course, the relator's share of the recovery, *see* 31 U.S.C. § 3730(d). Yet that is exactly what would happen here if Mistick were allowed to go forward with this case. Even if HACP used non-HUD money to pay any judgment, the diversion of these funds from other places in HACP's tight budget would require increased HUD funding to enable HACP to fulfill its mission. Moreover, even if HACP successfully defended the case, the litigation costs are likely to be monstrous, putting further burdens on HACP's budget.

Even if HACP's dependence on federal funds were not enough to warrant denial of the petition, Mistick already derived substantial benefit from the change in the lead based paint abatement specification and, thus, it should not receive a windfall by being allowed to recover as a *qui tam* relator. If HACP did not obtain a change in the specification, Mistick would have sustained a devastating loss in the application of Glid Wall because of its bidding error. Thus, it is understandable why Mistick would insist upon the change in specifications. Mistick averted that loss when HUD approved the change and agreed to pay the increased cost of Mistick's revised bid using Zomat. Mistick now wants to capitalize upon the change in specifications by bringing this *qui tam* action. This Honorable Court should not condone such opportunism.

It would be contrary to the legislative intent inherent in the False Claims Act to expend federal funds to recover federal funds net, of course, of the relator's litigation costs and share of the recovery. Further, Mistick has already benefited from the change in specifications and it should not be allowed to recover. Thus, a better vehicle to decide the questions presented in the petition — if they need to be decided at all — would be in a case involving target defendants who are not dependent on federal funding for survival and a relator that has not already benefited financially from the alleged fraud.

## III.

## THE PETITION SHOULD BE DENIED BECAUSE, GIVEN THE UNIQUE FACTS HERE, HACP PARTIES DID NOT KNOWINGLY SUBMIT A FALSE OR FRAUDULENT CLAIM.

This is an inappropriate case to review any questions arising under the False Claims Act because, given the unique facts, HACP parties did not knowingly present a false or fraudulent claim for payment. At worst, they negligently made a mistaken or erroneous representation to HUD about Glid Wall, as held by the state court almost one year before Mistick filed this *qui tam* action. This case does not involve any request for payment for non-existent work. The work was actually performed. Nor does this case involve any fraudulent overbilling. The proper price was paid. A mistaken or erroneous representation and request for payment for completed work, however, are insufficient to state a false or fraudulent claim.

The False Claims Act imposes liability on any person who "knowingly presents" to the United States government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). The statute specifically defines "knowing" and "knowingly" as a person or entity which: has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). Therefore, negligent mistakes or errors are not actionable. *Hindo v. University of Health Sciences*, 65 F.3d 608, 613 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114, 116 S. Ct. 915, 133 L. Ed. 2d 846 (1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996), *cert. denied*, 519 U.S. 1001, 117 S. Ct. 601, 126 L. Ed. 2d 393 (1996); *Ali v. United States*, 904 F. Supp. 915, 922 (E.D. Wis. 1995).

An offense under the False Claims Act is not the intent to deceive, but a knowing presentation of a claim that is either false or fraudulent. A showing of knowing fraud is essential to state a FCA claim. *Hagood*, 81 F.3d at 1478. This means the knowing presentation of what is known to be false, that is, a lie. *Hindo*, 65 F.3d at 613; *Wang*, 975 F.2d at 1420. Therefore, any alleged act of HACP parties must involve more than a "mistake" or "negligence." Proof of one's mistakes or inabilities is not evidence that one is a cheat. *Wang*, 975 F.2d at 1421. Here, HACP parties did not make knowingly false or fraudulent statements as matter of law.

The complaint rightly asserts that, beginning in August 1986, HUD regulations required the elimination, as far as practicable, of the hazards of lead based paint poisoning at public housing projects. 24 C.F.R. §§ 35.20-35.24. In light

of these regulations, part of the renovations at the Addison and Bedford projects included the abatement of lead based paint. Astorino's specifications for this work required encapsulation, an allowable abatement method. These specifications approved the use of either a product known as Glid Wall or a product known as Pentagon Plastics. Mistick, a knowledgeable and sophisticated contractor, voluntarily selected Glid Wall. To pay for Mistick's lead abatement work, HACP intended to use HUD funds. Without question, HACP fully intended to perform lead abatement work, which, of course, had to be paid for. Therefore, any claims for HUD funds to pay for this work would not have been false or fraudulent. Claims for HUD funds would have been false or fraudulent only if HACP submitted them without any intention of having the work performed or if it overcharged for the abatement work, and used the funds for something other than lead abatement work. However, HACP's request for funding was not for non-existent or unperformed work nor was it for overpriced work, but for work that was actually undertaken and properly priced. Hence, HACP was not cheating or lying to HUD in requesting funding.

In March 1990, the specification for lead abatement work was changed by replacing Glid Wall with a product known as Zomat. The reasons for this change included, but were not limited to, the concerns surrounding the manufacturer's alleged refusal to sell Glid Wall as a lead based paint encapsulant and Mistick's bid error involving the application of Glid Wall, which error would have caused Mistick to incur a substantial loss had the Glid Wall been applied. After the specification was changed to Zomat, that product was installed by Mistick. To pay for this installation, HACP requested HUD funds. Again, the Housing Authority did not

request payment for non-existent, unperformed work, or for overpriced work, but for work that was actually undertaken and properly billed. Thus, HACP did not cheat HUD by requesting payment for something that did not exist or was not done.

HACP and its officials manage housing projects. They are not experts in lead based paint, wall coverings and/or lead abatement methods and procedures. Hence, any assent to the Glid Wall specification was clearly based upon a mistaken and erroneous interpretation of information and documentation HACP had received. Such a mistake or error does not, as a matter of law, constitute an intent to defraud the government, particularly because HACP requested funding for work that was to be and eventually was performed. Moreover, had Zomat been originally specified, HACP would have requested HUD funds to pay for its installation in any event. The mere fact that HACP may have originally mistakenly assented to the Glid Wall specification and subsequently changed the specification to Zomat before any Glid Wall was installed, does not change the fundamental fact that HACP at all times requested funds for the performance and completion of actual work for which a contractor would and did seek payment. Because HACP never requested funding for something that did not exist, for something that was not done or for something that really cost less, HACP did not cheat the government. Although HACP may have erroneously agreed to the Glid Wall specification, its request for funding to pay for work that was to be and ultimately was actually performed and completed was not a false or fraudulent claim for payment.

Because a false or fraudulent claim was not knowingly presented, as required by 31 U.S.C. § 3729, this is an

inappropriate vehicle to decide any other questions arising under the False Claims Act. If any of the questions raised in the petition need to be decided, a better case would be one involving a claim for work that was not done or for overcharges.

## IV.

## THE PETITION SHOULD BE DENIED BECAUSE THE *QUI TAM* CASE WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

On July 16, 1991, Mistick filed suit against the HACP to recover damages allegedly arising out of the renovation work it performed at the Bedford and Addison projects. As with the present *qui tam* claims, the focus of this prior litigation was the change of the lead abatement specification from Glid Wall to Zomat and the increased cost of performance that this allegedly created. Essentially, Mistick asserted, in the state court action, that in complete disregard of the alleged fact that Glid Wall was no longer marketed or sold for lead based paint encapsulation, HACP and Astorino specified Glid Wall as the lead based paint encapsulant for the projects. Ultimately, this allegedly incorrect specification had to be changed to Zomat, thereby increasing the cost of the renovation work. The identical assertions were made in the federal complaint.

After years of litigation, the state court case was settled in May 1996. This settlement was memorialized by the execution, on August 1, 1996, of a release by HACP and Mistick, and was finalized, on August 5, 1996, by a dismissal of all claims. Thus, the Glid Wall specification issue was

fully and completely litigated to a mutually acceptable resolution. This should preclude the present claims under the doctrine of res judicata.

Res judicata, or claim preclusion, preserves the finality of concluded or resolved litigation. *Carbonaro v. Johns/ Manville Corp.*, 526 F. Supp. 260, 262 (E.D. Pa. 1991). Under the doctrine of res judicata, a resolution of a prior suit bars a second suit involving the same parties or their privies based upon the same subject matter or occurrences. *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 557 n.5 (1979). Res judicata is "designed to draw a line between a meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." *Purter v. Heckler*, 771 F.2d 682, 689, 690 (3d Cir. 1985).

Res judicata will be applied against a plaintiff even though the plaintiff has proposed different theories of liability in the subsequent action. *Coggins v. Carpenter*, 468 F. Supp. 270, 280 (E.D. Pa. 1979). This doctrine not only bars the reassertion of a matter which was actually offered and received in the initial proceeding, "but also as to every ground of recovery or defense which might have been presented." *Ley v. Boron Oil Co.*, 454 F. Supp. 448, 449 (W.D. Pa. 1978); *Coggins*, 468 F. Supp. at 280. A judgment or decree, though entered by consent or agreement of the parties, is res judicata to the same extent as if entered after contest. *Allegheny International, Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1429 (3d Cir. 1994); *Keystone Building Corp. v. Lincoln Savings & Loan Association*, 468 Pa. 85, 90 n.6, 360 A.2d 191, 194 n.6 (1976). Thus, a dismissal with prejudice after a settlement constitutes an adjudication of

the merits as fully and completely as if the order had been entered after trial. *Gambocz v. Welencsics*, 468 F.2d 837, 840 (3d Cir. 1972).

*United States ex rel. Paul v. Parsons, Brinkerhoff, Quadė & Douglas, Inc.*, 860 F. Supp. 370 (S.D. Tex. 1994), is dispositive of the res judicata issue. In that case, an employee of a subcontractor brought a *qui tam* action alleging that the subcontractor and its joint venture submitted fraudulent claims for payment to the government. Previously, the employee had brought a state court suit against the subcontractor alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. In granting a motion to dismiss, the district court held that the False Claims Act case was barred under the law of res judicata because the employee could have raised these claims in the prior state court action. *Id.* at 373-75. The court noted that because the False Claims Act states that an action arising under it may be brought in federal court, there exists concurrent jurisdiction between state and federal courts. *Id.*; 31 U.S.C. § 3732(a). The following passage succinctly summarizes the court's holding:

> In this case, the complaint arose from the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in these activities lead to his discharge. Paul alleges that PBQ and D and BMI participated with PB-KBB in the illegal acts. Although the

> complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

860 F. Supp. at 374.

This case is no different than *United States ex rel. Paul.* Both Mistick's prior state court action and its present *qui tam* action arose from the same operative facts, and both claims could have been adjudicated in the state court in one convenient proceeding. Nothing prevented Mistick from bringing all claims arising out of the Glid Wall specification in the state court. It certainly had ample time to bring the claims because Mistick alleges that it discovered the fraud in 1990 yet the state court action did not end until 1996. It simply chose not to do so. Instead, while the state court action was winding down, it secretly filed the *qui tam* case in federal court.

Because the earlier state court litigation has been resolved and dismissed, the principles of res judicata bar the current False Claims Act suit and Mistick's attempt to get a second bite at the apple. Accordingly, a better case to decide the issues raised by the petition — if they need to be addressed — would be a case in which the relator did not previously sue the defendants on similar grounds.

## V.

## THE PETITION SHOULD BE DENIED BECAUSE THE TERMS OF THE HACP/MISTICK RELEASE BAR THE PRESENT CLAIMS.

The prior civil litigation brought by Mistick against HACP in state court was settled in May 1996. On August 1, 1996, Mistick and HACP executed a settlement agreement and release of claims terminating the litigation. This release bars the present claim.

In pertinent part, this release provides that in return for HACP's payment of a certain sum, Mistick released and forever discharged HACP and each of its directors and officers, among others,

> of and from *any and all liability*, responsibility and/or obligation *for any and all causes of action*, claims or demands for damages, losses, costs, expenses, compensation, proceeds, fees and/or monies, known and unknown, which Mistick PBT has made, claims to have and/or may hereafter have or claim to have in the lawsuit entitled Mistick PBT d/b/a Mistick Construction, formerly known as Mistick Incorporated v. The Housing Authority of the City of Pittsburgh, No. 91-12543 of the Court of Common Pleas of Allegheny County, Commonwealth of Pennsylvania, including particularly, *without limitation*, any and all sums owed or claimed to be owed to Mistick PBT for losses or damages incurred or claimed to have been incurred by Mistick PBT *arising from the performance of the Bedford Dwellings*

> *remodeling and reconstruction contract . . . and/ or the performance of the Addison Terrace remodeling and reconstruction contract.*

(Emphasis added). This language expressly and unambiguously includes Mistick's present claims, and requires them to be dismissed.

There is a strong judicial policy in favor of parties voluntarily settling lawsuits. Therefore, voluntary settlements of civil litigation are specifically enforceable and broadly interpreted. *Pennwalt Corp. v. Plow, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982). A signed release is binding upon the parties unless executed and procured by fraud, duress, accident or mutual mistake. *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Reed v. Smithkline Beckman Corp.*, 569 F. Supp. 672 (E.D. Pa. 1983). Importantly, a release is binding even as to claims unknown at the time the release was executed if this was the intended scope of the release. If the parties manifest an intent to settle all claims, a release will be given full effect even as to unknown claims. *Total Containment, Inc. v. Environ Products, Inc.*, 921 F. Supp. 1355, 1415 (E.D. Pa. 1995). *See also Three Rivers*, 522 F.2d at 896; *Shlensky v. Dorsey*, 574 F.2d 131, 144 (3d Cir. 1978).[19]

19. Undeniably, when the civil litigation was settled in May 1996, Mistick had full and complete knowledge of its *qui tam* claims. Indeed, its federal complaint was filed under seal seven months earlier in November 1995. Mistick secreted this action from HACP during settlement negotiations. Accordingly, HACP parties had no knowledge of the federal complaint until it was served in August 1996, within a matter of days after the state court case ended. Although Mistick knew of the *qui tam* action when the release settling the state court action was executed, Mistick reserved no rights relating to its *qui tam* claims.

The focus of the prior civil action filed in state court was the Glid Wall specification, its change to Zomat and the alleged increased costs that this caused. The settlement of this civil claim was consummated when Mistick and HACP executed a release of claims. According to the unequivocal and unambiguous terms of the release, Mistick forever discharged HACP from any and all liability for any and all causes of action arising out of the remodeling and reconstruction work at the Bedford and Addison projects. Mistick reserved no rights to litigate any other claims arising out of this work. Thus, the claims made the basis of this litigation have been expressly released. This release must be enforced by ending this litigation.

Mistick may argue that the release does not bar this litigation because, as the private relator, Mistick cannot settle the *qui tam* action without the consent of the United States and the court. Such a blithe assertion utterly miscomprehends the circumstances surrounding HACP's argument based upon the release. The motion to dismiss was not based upon any settlement of an existing *qui tam* action to which the government, admittedly, must consent. 31 U.S.C. § 3730(c)(2)(B). Instead, HACP relies upon a release executed by a private party, the relator, who is, in reality, the only real party in interest now that the government declined to intervene.

The reality that Mistick cannot escape is the following:

- The United States declined to intervene in the instant litigation. By definition, Mistick is prosecuting this action in its own name. The release, however, bars Mistick from prosecuting any other actions against HACP arising out of the renovation work at Bedford and Addison.

- If this action is successful, the False Claims Act entitles Mistick to recover substantial proceeds, fees, and expenses. *See* 31 U.S.C. § 3730(d)(2). In its amended complaint, Mistick prays for such a recovery in its own name. But for this financial incentive, Mistick would not be prosecuting this *qui tam* action. The release, however, bars Mistick from recovering any other proceeds, fees and expenses as a result of the Bedford and Addison projects.

- Nothing prevented Mistick from obtaining the consent of the United States and the court before agreeing to settle with HACP in May 1996. Instead of obtaining the consent of the United States and the court as it should have, Mistick, on the one hand, secreted the settlement from the United States and the District Court and, on the other, concealed the *qui tam* action from HACP. The motives for doing so are clear. Mistick desired to make another recovery from HACP. The HACP/Mistick release, however, prohibits this.

- The release was executed approximately three weeks after the United States declined to intervene and the District Court unsealed the record. During these three weeks, Mistick easily could have obtained the required consent from the United States and the court, assuming that the consent of the United States was still required after the United States declined to intervene. But note the consent of the United States is required only until the United States declines to intervene. *United States ex rel. Killingsworth v. Northrop Corporation*, 25 F.3d

715, 722-23 (9th Cir. 1994); *United States v. Northrop Corp.*, 59 F.3d 953, 959 (9th Cir. 1995). This Mistick did not do. Additionally, after the United States declined to intervene, Mistick easily could have informed HACP of the *qui tam* action before consummating the settlement. This Mistick also did not do. Instead, Mistick continued to hide this action from HACP until the federal complaint was served several days after the release was executed. Regardless of what Mistick did or did not do, the fundamental point remains that the release expressly prohibits Mistick from making any additional recovery from HACP as a result of the Bedford and Addison renovations.

- In a showing of good faith and fair dealing with HACP in light of the settlement, nothing would prevent Mistick from withdrawing as the relator in the instant litigation. Indeed, nothing compels Mistick to prosecute the present *qui tam* action. Mistick's only reason for doing so is to recover the proceeds, fees and expenses to which it would be entitled if its efforts are successful. The release, however, prohibits such a recovery.

The release requires Mistick to be dismissed as the relator in this action. No provision of the False Claims Act prohibits Mistick's dismissal as the relator. Alternatively, the clear and unambiguous terms of the release prohibit Mistick from recovering any additional proceeds, fees and expenses from the HACP arising out of the Bedford and Addison renovation projects. In this regard, the rationale of *United States ex rel. Dunleavy*, 123 F.3d 734 (3d Cir. 1997), is enlightening. In that case, the Third Circuit held that there

was a justiciable case or controversy despite the government's settlement of the False Claims Act case because the relator had a separate interest in recovery. 123 F.3d at 738-39. Here, as in that case, the government did not intervene. However, unlike *Dunleavy*, Mistick renounced its right to further recovery from HACP by execution of the release. Therefore, this case is inappropriate to decide any questions arising under the False Claims Act. A better case would be one in which the relator did not settle with the defendants before filing in federal court.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Astorino parties' brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE UNITED STATES**

October 1999 Term

MISTICK PBT,

*Petitioner,*

vs.

HOUSING AUTHORITY OF THE CITY OF PITTSBURGH, *et al.*,

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FEBRUARY 28, 2000

16pp

## STATEMENT UNDER SUP. CT. R. 29.6

Petitioner Mistick PBT is a Pennsylvania business trust and is not a "corporation" under Pennsylvania state law. In any event, Mistick has no parent or subsidiary company ("subsidiary" being defined as ownership by Mistick of greater than 50%).

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## PRELIMINARY STATEMENT

On December 8, 1999, Petitioner Mistick PBT ("Mistick" or "Petitioner") filed a Petition for Writ of Certiorari (the "Petition") with this Court. Mistick files this Reply Brief in reply to the Briefs in Opposition to Mistick's Petition filed on or about February 7, 2000 by Respondents Astorino and HACP (as defined in Mistick's Petition). As discussed in more detail below, Respondents' Briefs systematically avoid, obfuscate, misunderstand and otherwise fail to refute the compelling reasons for granting *certiorari*, as set forth in Mistick's Petition.

Most notably, Respondents concede, although attempt to muddle, a divergence of decisions among the United States courts of appeals with regard to the interpretation of the "based upon" phrase used in the private litigant (*qui tam*) jurisdictional bar of the False Claims Act (the "Act"), 31 U.S.C. §3730(e)(4)(A), as amended by Congress in 1986. This circuit split has gravely weakened the effectuation of critical national policy goals and must be resolved by this Court. Each year, tens of billions of federal dollars, including an estimated $20 billion of Medicare funds, are lost due to fraud, despite Congress' clear and express intention in 1986 to encourage more private policing of fraud through the amendments to the Act's *qui tam* provisions. *See* Mistick Petition, at 11-16. Unless the circuit split is resolved as Mistick urges, recovery of the dollars lost due to fraud and the bringing to justice of the perpetrators will be dramatically impacted and dependent upon mere fortuity,

*e.g.*, in which circuit the perpetrators happen to be located.[1]

## REASONS FOR GRANTING THE PETITION

### I. Respondents Concede That a Split Exists Among the United States Courts of Appeals As to the Interpretation of "Based Upon"

Respondents concede the existence of a split among the courts of appeals as to the meaning of the "based upon" phrase in §3730(e)(4)(A), and attempt only to minimize the *degree* of the split among the circuits. *See* Astorino Brief, at 11. However, in addition to being irrelevant to the pertinent issue, *i.e.*, whether a circuit split exists, Respondents' attempts to downplay the degree of the split are factually incorrect.

For example, Respondents do not dispute that the Third Circuit panel majority adopted an interpretation of

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[1] With the exceptions of Sections I and II thereof, which incorporate the Brief of the Astorino Respondents and make other arguments addressed in this Reply, HACP's Brief raises arguments that are not properly before and should not be considered by this Court and will not be addressed in this Reply. These improper arguments are that HACP did not present a "knowingly" false claim to HUD, as required by the Act, and that Mistick's claims are barred by the doctrine of *res judicata* and/or the alleged terms of a release. *See* HACP Brief, at 12-25. These arguments were not addressed by either the District Court or the Third Circuit, and in fact, at oral argument before the Third Circuit panel, the court specifically indicated to counsel for HACP that the District Court should address those issues in the first instance. *See* Transcript of 6/9/98 Argument, at 37-38. Moreover, the HACP's improper arguments are irrelevant to this Court's standards and reasons for granting *certiorari* as addressed in Mistick's Petition.

"based upon" that directly conflicts with the Fourth Circuit's "derived from" plain language interpretation of that phrase in *United States ex rel. Siller v. Becton Dickson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). Rather, Respondents merely quibble over whether the First and Seventh Circuits really adopted the Fourth Circuit's *Siller* ruling. However, in *United States ex rel. LeBlanc v. Raytheon Co.*, the First Circuit explicitly affirmed the district court's ruling that "[i]n light of the plain meaning of the words 'based upon,' this Court is inclined to agree with the Fourth Circuit" interpretation as set forth in *Siller*. *United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 40-41 (D. Mass.), *aff'd* 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). As noted in Mistick's Petition, the First Circuit issued an unpublished opinion affirming the district court's judgment "for substantially the reasons elucidated in the opinion below." *See* Mistick Petition, at 17 n.16 (*citing United States ex rel. LeBlanc v. Raytheon Co.*, 1995 WL 471105, at *1 (1st Cir. Aug. 9, 1995) (Selya, J.)).

Respondents contend that the First Circuit's affirmance of *LeBlanc* somehow does not really count because the First Circuit "did not write an opinion," but rather "summarily affirmed." *See* Astorino Brief, at 12. That contention, however, is directly contrary to established law. This Court specifically has treated a court of appeals' summary affirmance *without* published opinion of a district court's published opinion as sufficient to create a circuit split. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-25 & n.6 (1975). Moreover, as a matter of general practice, an unpublished opinion of a court of appeals binds other panels of that court. *See* 16A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 3d §3981.1 (1999); *see also Harris v.*

*Menendez*, 817 F.2d 737, 740 (11th Cir. 1987) (describing a court of appeals' published affirmance of a district court opinion "for the reasons and authorities cited" therein as "effectively adopt[ing] and republish[ing] as an appellate opinion the district court's opinion").[2]

Similarly, in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), the Seventh Circuit expressly found that "[t]he Fourth Circuit's interpretation of 'based upon' is the better on the grounds both of plain meaning and public policy." *Id.* at 863. Contrary to Respondents' assertions, the Seventh Circuit specifically applied the Fourth Circuit's "derived from" interpretation of "based upon," which it described as the "preferred" reading, in determining that the relator's complaint was barred under §3730(e)(4). *Id.*

Respondents also suggest that there is, somehow, no actual split among the circuits because the First, Fourth and Seventh Circuits have not expressly discussed whether a plain meaning interpretation of "based upon" in §3730(e)(4)(A) renders the "original source" provision of

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[2] By local rule, the First Circuit has stated that where a district court opinion is "published, the order of court upon review shall be published even when the court does not publish an opinion," although an unpublished opinion may be cited only in "related cases." *See* 1st Cir. R. 36.2(b)(5) & (6). The First Circuit has also stated that it may rely on an unpublished opinion, even if the rules of the court issuing the opinion would not so allow, to the extent the rationale of those rules is unavailability of the opinion and the opinion in fact is available to the parties. *See Aviles v. Burgos*, 783 F.2d 270, 283 & n.4 (1st Cir. 1986) (addressing unpublished opinion of Supreme Court of Puerto Rico).

the next section, §3730(a)(4)(B), superfluous. This is simply not a serious argument. The pertinent issue is whether the circuits have split as to the meaning of the phrase "based upon" in the statute, not whether some particular chain of reasoning favored by Respondents was or was not employed. As explained in Mistick's Petition, and as largely conceded by Respondents, several circuits have so split. Respondents cannot eliminate that split by "wishing" it away.[3]

## II. Respondents Ignore That the Third Circuit Panel Majority's Open Rejection of a Plain Meaning Interpretation of "Based Upon" Conflicts With Decisions of This Court

Respondents largely attempt to sidestep Petitioner's demonstration that the Third Circuit panel majority acted contrary to this Court's decisions mandating that a statute be interpreted according to the plain meaning of the terms chosen by Congress regardless of almost all other considerations. Respondents do not contest that the panel majority expressly decided not to apply the plain and

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[3] Similarly unrealistic, to say the least, is HACP's suggestion that Mistick's Petition is not important because HACP is subsidized by HUD and therefore a judgment against HACP would not truly add to the federal treasury. *See* HACP Brief, at 10-11. Among other defects, HACP's argument (1) appears to advocate, incredibly, that some sort of license to defraud be created for state and local agencies funded by the federal government, (2) ignores that HACP is not wholly HUD funded, (3) fails to explain why an adverse judgment for fraud would be an appropriate budget item for which HACP to receive federal funding, and (4) ignores that co-defendants, such the Respondent officers of HACP, may be personally liable for any fraud committed.

unambiguous meaning of "based upon," which the panel majority admitted is "derived from." *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 385-88 (3d Cir. 1999) (Appendix A at 21a-27a). Nor do Respondents appear to contest, at least directly, that under this Court's decisions, plain language interpretation is the "cardinal canon before all others" and "when the words of a statute are unambiguous, *then, this first canon is also the last: 'judicial inquiry is complete.'*" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (emphasis added).[4]

Similarly, also unanswered are this Court's consistent rulings that "[r]edundancies across statutes are not unusual events in drafting," and that "so long as there is no 'positive repugnancy' between two laws," poor drafting does not give the courts license to disregard the plain meaning of the terms chosen by Congress. *Id.* (*citing Wood v. United States*, 16 Pet. 342, 363 (1842)); *H.J. Inc.*

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[4] Respondents do suggest that *Connecticut National Bank* gave primacy to a plain language interpretation only because no part of the statute at issue would have been rendered superfluous as a result. *See* Astorino Brief, at 23. In fact, however, at the very most, this Court suggested only that "giving effect to both [of the provisions at issue] would not render one or the other *wholly* superfluous . . .." *Connecticut Nat' Bank*, 503 U.S. at 253 (emphasis added). Thus, *Connecticut National Bank* makes clear that plain language interpretation must be followed so long as one of the provisions retains even minimal independent significance, and is entirely is consistent with Petitioner's position here. *See* Mistick Petition, at 22-23 (explaining how "original source" provision of 3730(e)(4)(B) would continue to retain at least some independent significance under a plain language interpretation of "based upon"); *Mistick*, 186 F.3d at 399-400 (Appendix A at 53a-55a) (Becker, C.J., dissenting) (same).

*v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989); *United States v. Locke*, 471 U.S. 84, 95 (1985).

Instead, Respondents obfuscate the actual issue by contending that Petitioner has failed to address the canon of statutory interpretation regarding rendering terms superfluous, *see* Astorino Brief, at 22-23, which under this Court's decisions, as noted previously, is merely a *subsidiary* canon of interpretation. In purported support for their contention, Respondents cite to *United States v. Correl*, 389 U.S. 299 (1967), for the proposition that the doctrine of avoiding superfluous interpretations "must be invoked, even if the plain language of a statute is unambiguous." *See* Astorino Brief, at 23. This, however, is an incorrect citation to *Correl*.

To the contrary, it was precisely because the statute at issue in *Correl* was *ambiguous*, and "no appeal to the 'plain language' of the section [could] obviate the need for further statutory construction," that reliance on additional rules of statutory interpretation became necessary in that case. *See Correl*, 389 U.S. at 304 n.16. As such, *Correl* actually supports *Petitioner's* position in this case, insofar as the term "based upon," as even the Third Circuit panel majority admitted, has a plain and unambiguous meaning of "derived from."

## III. Respondents Misunderstand the Issue Presented Regarding the "Administrative Report" and "Administrative Investigation" Terms of the Act

Respondents summarily dismiss Mistick's disagreement with the Third Circuit panel majority's characterization of Petitioner's FOIA request as an "administrative report" or "administrative investigation"

under §3730(e)(4)(A). According to Respondents, the panel majority's decision "is in accord with every other Circuit that has addressed the issue." Astorino Brief, at 9.

Respondents again, however, have misconstrued the pertinent issue. Even assuming for the sake of argument that a response to a FOIA request may be a "public disclosure" in some sense,[5] this is the *beginning, not the end*, of the analysis under §3730(e)(4)(A). The pertinent issue then becomes whether that "public disclosure" is *also* made "in a criminal, civil or administrative hearing, in a congressional, *administrative* or Government Accounting Office *report*, hearing, audit, or *investigation*, or from the news media," as the statute explicitly requires. *See* 31 U.S.C. §3730(e)(4)(A) (emphasis added).

Here, the Third Circuit panel majority held, out of all bounds with the plain meaning of language, that the FOIA request generated an "administrative report" in an "administrative investigation" under the statute, and *these* are the issues Mistick brings before this Court. *See* Mistick Petition, at 24-26. *Nowhere* do Respondents, or the cases they cite, address these issues.[6]

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[5] *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997); *see also United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717 (6th Cir. 1999).

[6] *Burns* in fact *endorses* Petitioner's contention that "[c]ourts that have considered the issue of sources of public disclosure note that the list of sources set out in the statute is exhaustive." *Burns*, 186 F.3d at 725 (*citing United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997)).

## IV. Respondents Evade Mistick's Interpretation of the "Original Source" Provision

Respondents evade the specific arguments made in Mistick's Petition regarding the Third Circuit panel majority's conclusion that Mistick failed to qualify as an "original source" under §3730(e)(4)(B). *See* Mistick Petition, at 27-28. As noted by Mistick, the panel majority's key point of departure from decisions of other courts in this regard is its requirement that a relator in effect have "direct and independent" knowledge of *both* the essential elements of the fraud, *i.e.*, both the misrepresented state of facts ("X") and the true state of facts ("Y"), to qualify as an original source. *See* Mistick Petition, at 27 (citing *Mistick*, 186 F.3d at 388-89 (Appendix A at 27a-28a)).

Decisions of other courts of appeals, as well as, ironically, a prior decision of the Third Circuit, have ruled to the contrary that a relator need only have "direct and independent" knowledge of *either* the misrepresented state of facts (X) *or* the true state of facts (Y) to qualify as an original source. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 969 (9th Cir. 1999) (relator was original source even though it did not learn basis for claims of false statements to government until discovery in *qui tam* action), *petition for cert. filed*, No. 99-1060 (Dec. 21, 1999); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (relator is original source where it has direct and independent knowledge of any essential element, X or Y); *see also United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("undoubtedly, it is not

necessary for a relator to have all the relevant information in order to qualify as 'independent'").

Under these decisions, a relator whose *qui tam* claim would otherwise be barred under §3730(e)(4)(A), as partially "based upon," *i.e.*, "derived from," a qualifying statutory "public disclosure," could nevertheless qualify as an "original source" under §3730(e)(4)(B), meaning that the original source provision is not rendered superfluous by interpreting "based upon" plainly. *See* Mistick Petition, at 21-23, 28. In contrast, by requiring that a relator have direct and independent knowledge of both the "X" and "Y" elements, the panel majority here in effect has rewritten §§3730(e)(4)(A) and 3730(e)(4)(B) so that each of these provisions applies the *same* jurisdictional standard, rendering one or the other provision superfluous. *See* Mistick Petition, at 27.

## CONCLUSION

For all the foregoing reasons, this Court should grant Mistick's Petition for Writ of Certiorari.

Respectfully submitted,

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FEBRUARY 28, 2000